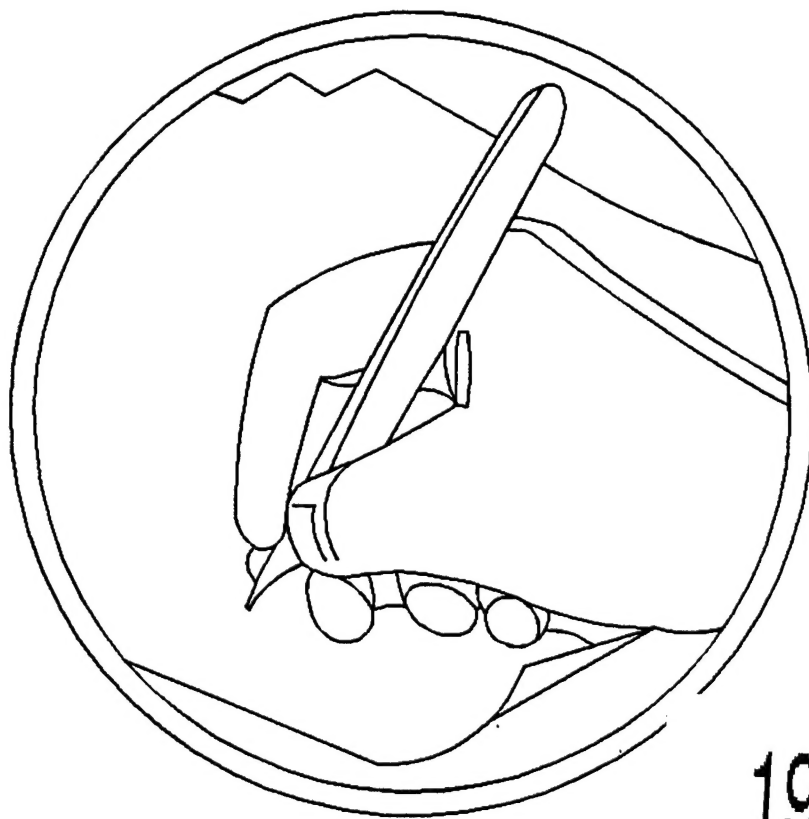


# WILLS GUIDE



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## PREFACE

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There are, however, several ways to obtain many of these publications. First, the Defense Technical Information Center (DTIC) makes some of these publications available to government users. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (703) 767-9087 or DSN 427-9087.

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JA 261	Legal Assistance Real Property Guide
JA 262	Legal Assistance Wills Guide
JA 263	Legal Assistance Family Law Guide
JA 265	Legal Assistance Consumer Law Guide
JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 269	Legal Assistance Federal Income Tax Information Series
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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# **CHAPTER 1**

## **INTESTACY AND WILLS**

### **I. INTESTACY**

#### **A. GENERALLY**

Intestacy is usually the result of an absence of estate planning. A person who dies without a will is considered to have died intestate. The distribution of estates of intestate decedents is a matter for state regulation. State law directs the distribution of the decedent's property to his or her heirs and, in effect, writes the will the decedent failed to make.

Each state has its own particular statutes and judicial decisions in this area. These laws and decisions establish general principles regarding the disposition of property, guardianship of children, rights of relatives, and rules as to how estates are managed and who manages them.

The laws in question are determined by the state in which the decedent had his domicile and the states where any real property is located. These laws vary and consequently the law of the appropriate state must be consulted.

#### **B. DESCENT AND DISTRIBUTION**

At common law a distinction was drawn between the descent of property and the distribution of property. The term descent usually applied to real property passing to the heirs of the deceased. Distribution usually applied to personal property which passed to the next of kin. This distinction has been largely eliminated in this country and realty and personalty are handled alike.

Many clients believe that a surviving spouse automatically inherits the decedent's entire estate when there is no will. In most states this is not true. If there are surviving children, the spouse inherits only a portion of the estate. This portion may be expressed as a percentage of the intestate estate, or as a fixed sum plus a percentage share of the balance. The surviving children receive the remainder of the estate and share equally. Issue of a deceased child inherit the share their parent would have received if the parent survived. Descendants, however remote, take in preference to other blood relatives.

In most states, parents take in the absence of descendants, subject to the share of the surviving spouse. Brothers and sisters take next after parents, though in some states they share with parents. Nephews and nieces are permitted to take the share of their predeceased parent if other brothers and sisters survive, but if nephews and nieces are the sole survivors they usually take equally. The appropriate statutes must be consulted to determine the percentages and priorities among surviving relatives.

If none of the specified relatives survives the intestate, the property passes to the decedent's next of kin. The modern approach, as reflected in the Uniform Probate Code, limits next of kin to collateral relatives who are lineal descendants of the decedent's grandparents. In the absence of any next of kin, the intestate estate passes to the governing state.

Next of kin may be determined according to the civil law or common law rule. Under the traditional civil law approach, the degree of relationship is determined by counting the number of steps from the claimant to the closest common ancestor and then adding the number of steps from this common ancestor to the intestate. The sum of these two counts is the degree of relationship of the claimant to the intestate. If the claimant is related in the lowest degree he takes as next of kin. If several claimants are related in equal degree they are all next of kin and share equally.

A few statutes expressly declare that the computation shall be by the common law method. This method establishes the degree of relationship as the number of steps in the longer of the two lines from the common ancestor to the intestate and to the claimant, instead of the sum of both.

#### C. ADMINISTRATION EXPENSES

The cost of administering an estate may be significantly greater when there is no will. The administrator (administratrix, if female) of an estate will generally be required to post bond with surety. In the absence of a will the actions of an administrator will be restricted and judicial authorization may be required before he can effectively act. Proceedings requiring court approval are paid for by the estate.

#### D. DOWER AND CURTESY

At common law, the surviving spouse had a right of dower or curtesy in the real property of the deceased spouse. Under present state law, the rights of dower and curtesy have been abolished or modified drastically. The laws of the states in which the decedent was domiciled and owned real property must be consulted in order to determine the full rights of the surviving spouse.

The rights of surviving spouses differ in community property jurisdictions. Although the disposition of community property varies somewhat in different states, the surviving spouse generally receives at least one-half of the community property. Property owned prior to marriage or received by gift or inheritance during marriage is not considered to be community property. The law of descent and distribution in community property jurisdictions provides different rules for

community property and separate property. Moreover, community property acquired while the spouses reside in one jurisdiction is not converted into separate property merely by a change in domicile. Great care must be exercised in advising clients who have resided in community property states at any time while married.

## **II. WILLS**

### **A. BASIC REQUIREMENTS**

Each state has statutes which establish the requirements for a valid will. Generally, execution of a valid will requires that the testator (testatrix, if female) be a minimum age and possess testamentary capacity. In most states, the minimum age is eighteen. Some states permit an individual below the minimum age to execute a will if the person is married or in the military. The testator also must be of sound mind at the time the will is executed. Sound mind requires that the testator:

1. Know that he or she is executing a will;
2. Know the general nature and extent of his or her property; and
3. Know his descendants or other relatives that would ordinarily be expected to share in the estate.

The will's format must conform to the standards prescribed under state law. Most states require that a will be written or typed, signed by the testator, and attested by two or three witnesses.

### **B. INTERESTED WITNESS**

An interested witness is one who attests the execution of a will in which he or she is named as a beneficiary. The effect of an interested witness depends on state law. The will is not invalidated in most jurisdictions, but the beneficial provision to the interested witness may be void. If the witness would be entitled to an intestate share, the witness normally would be entitled to receive the smaller of the share stated in the will or the intestate share.



## C. TYPES OF WILLS

There are four types of wills - statutory wills, holographic wills, nuncupative (oral) wills, and soldiers' and seamen's wills.

1. **Statutory Will** - A statutory will complies with the usual statutory requirements for a will. In most jurisdictions, the will must be written or typed, signed by the testator, and formally subscribed by two or three witnesses. See Chapter 2, Paragraph O for further discussion of statutory wills.
2. **Holographic Will** - A holographic will is one which is wholly in the handwriting of the testator and is signed. In some states only the material provisions and signature must be handwritten. It requires no witnesses and usually does not require a date. The will does not need specific testamentary language, but generally must evidence testamentary intent.
3. **Nuncupative (Oral) Will** - A nuncupative will is an oral will. Many jurisdictions do not recognize unwritten wills. Where recognized, oral wills are usually limited to when the testator is in military service or when death is imminent at the time of the declaration.
4. **Soldiers' and Seamen's Will** - Some states permit individuals in actual service in the Armed Forces to dispose of their wages and personal property by oral will or other informal writing. This type of will is often limited to service members performing duty in an enemy country during war, but some states do not require formal hostilities. This type of will ordinarily ceases to be valid after a specified time.

## D. FIDUCIARY REQUIREMENTS

A fiduciary is an individual appointed to take care of another individual's property or person. Four types of fiduciaries - executors, trustees, custodians, and guardians - are commonly appointed by will.

The executor is responsible for administering the testator's probate estate. This process includes probate of the will, marshalling the estate assets, payment of the decedent's debts, taxes and other estate liabilities, and distribution of the remaining assets to the beneficiaries in accordance with the terms of the will.

State law may require the executor (or one of the co-executors) to be a resident of that state, but exceptions apply in many cases for close relatives of the testator. Many states require that individuals nominated as executors provide bond with surety at the time of appointment. The amount of the bond depends upon the value of the assets being administered. The testator can usually waive this requirement by express provision in the will. Although some states grant broad fiduciary powers to every executor as a matter of law, in most cases the executor's powers are limited to those set forth in the will or incorporated into the will by reference to an authorizing statute. In the absence of such powers, the executor may be required to seek court approval for certain actions in much the same way as an administrator appointed for an intestate estate.

The function of a testamentary trustee is usually considered to begin when the executor's role ends. The trustee appointed under the will receives a distribution from the estate in the same way as any other beneficiary. The trustee administers the assets in trust for the benefit of one or more individuals, such as the testator's children, who may be incapacitated or lack financial maturity. In some cases, a trust is created under the will for reasons that have little to do with the ability of the beneficiary to properly invest and manage the inherited property. It is not unusual for the testator's surviving spouse to be both the beneficiary and sole trustee of a trust created for estate tax savings. State laws applicable to the appointment of testamentary trustees, the requirement of bond with surety, and the grant of trustee powers generally parallel those pertaining to executors.

A majority of states now permit a testamentary gift to be made to a custodian on behalf of a minor under the Uniform Transfers to Minors Act or a modified version of the Uniform Gifts to Minors Act. A custodianship is clearly superior to appointment of a guardian for purposes of administering relatively small sums on behalf of a minor child. The custodian may be named in the will or the testator may authorize the executor or trustee to select a suitable custodian. The custodian has broad fiduciary powers set forth by statute. The powers of a custodian under the Uniform Gifts to Minors Act (UGMA) are somewhat more restricted than under the Uniform Transfers to Minors Act. For example, a custodian under the UGMA cannot take title to real property unless the statute has been appropriately modified.

Guardianship may refer to the care and custody of the testator's children or to the administration of the children's property, or both. It is generally advisable for the testator to include a provision in the will or other document designating a guardian or guardians of the person of any minor child who has no surviving parent. Whenever possible, this designation should be coordinated with the testator's spouse. Although the ultimate decision concerning custody of the child rests with the appropriate court, considerable weight is given to the wishes of the parents.

A guardian of the property of any minor children may also be appointed under the will. Because of the expense and inflexibility usually associated with guardianships, the testator should provide that property passing to a minor child be retained in trust or a custodial account.

## E. REVOCATION

A will may be revoked at any time. The best method to revoke a will is by executing a new will containing an express provision revoking all prior wills. Revocation also can be effected by executing a formal writing revoking a prior will or by physically destroying a will with an intent to revoke it. In many states a will may be wholly or partially revoked by operation of law due to a subsequent divorce, marriage, or birth.

## F. SPOUSE'S RIGHT OF ELECTION

In most states neither spouse can disinherit the other. When a spouse fails to provide an adequate portion of the estate for the survivor, the surviving spouse can accept the property passing under the will or exercise the right of election. The right of election gives the survivor the opportunity to take a distributive share of the estate provided by statute. Most statutes require that the survivor exercise the right of election within a certain period of time after the date of death or initiation of probate proceedings.

## G. SIMULTANEOUS DEATH

Most states have enacted statutes to govern the distribution of testate property when there is insufficient evidence to determine if a beneficiary survived the testator. The most common provision directs that the testator's property be distributed as if the beneficiary predeceased the testator. The testator can establish a different presumption of death by an appropriate provision in his will. In some instances the testator may require the beneficiary to survive for a certain period of time in order to receive a bequest. A "delay" clause of this type is often used to avoid the situation where the heir's death occurs soon after that of the testator. A delay clause that exceeds 180 days will disqualify a bequest to the spouse for the marital deduction.

When estate tax planning is an important consideration, it is common to provide that the spouse with the smaller estate is deemed to survive in the event of simultaneous death.

## H. CHOICE OF LAW

Under common law, the validity of a will disposing of real property is determined by the law of the situs of the land and the validity of a will disposing of personalty is determined by the law of the decedent's domicile. Several states have modified the common law rule by recognizing a will for all purposes which has been executed in accordance with the law of the state where the will was executed, or the state of the testator's domicile at the time of execution.

## I. SELF-PROVING PROVISION

A self-proving provision is a clause included at the end of the will or in an attached document containing the testator's acknowledgment and affidavits of the witnesses made before a person authorized to take acknowledgments and administer oaths. The self-proving provision recites that the requisite formalities were observed in executing the will. A self-proved will may be admitted to probate without additional witnesses or affidavits, but it is still subject to contest on such grounds as undue influence, lack of testamentary capacity, or prior revocation. Since witnesses to a military will may be difficult to locate at the time of the testator's death, military wills should always contain a self-proving provision.

## J. EXECUTION

Since the purpose of a witness is to furnish testimony at the time the will is presented for probate, considerable care should be made in selecting witnesses who most likely will be available at the time and place of probate. It is advisable, although not always possible, that the witnesses be permanent residents of the testator's home community. A self-proving provision should be used as a precaution since the witnesses may be unavailable when the will is probated.

Only one copy of the will should be signed and the remaining copies should note where the original is deposited. In some jurisdictions failure to locate the original will, which was in the testator's possession, creates a presumption that it was destroyed. A copy of the will, even though executed, may not be probated.

## K. STANDARD OPERATING PROCEDURE FOR EXECUTING WILL

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the will executions:

1. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.
2. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.

3. The testator and three persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.
4. The legal assistance attorney supervising the execution of the will should ask the testator the following question: "Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the three mentioned witnesses. The legal assistance attorney should also ask if the testator is executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.
5. The testator should initial or sign (caution: check NY state law for NY wills) on the margin of each page of the will. This is done for purpose of identification and to prevent the subsequent substitution of pages. The testator should then sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all three can see the testator sign.
6. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes", and the answer should be audible to the three mentioned witnesses.
7. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.
8. One of the witnesses should then read aloud the attestation clause.
9. Each witness should declare that the attestation clause is a correct statement.

10. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address and social security number opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.



# CHAPTER 2

## ESTATE PLANNING

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## **CHAPTER 2**

### **ESTATE PLANNING**

#### **I. GENERAL**

In the broadest meaning of the term, estate planning refers to the continuing process of coordinating an individual's financial affairs to secure the greatest economic security for self and family. It encompasses estate creation, estate conservation, and estate disposition. Estate planning is concerned with the nature and extent of the individual's investment program, the Social Security benefits to which the individual and his or her family may be entitled, the payment of other benefits incidental to employment, the testamentary distribution of assets, the adequacy and flexibility of life insurance programs, and even the post-mortem decisions made by an executor or administrator. A well-designed estate plan should provide not only for the orderly transfer of assets at the estate owner's death, but also take into account the need for retirement income and the contingencies of mental or physical disability.

Effective estate planning may amount to little more than preparation of a simple will and review of the beneficiary provisions of life insurance policies and employee benefit plans, or it may be a complex procedure involving trust instruments and inter vivos transfers of property. The size of the estate has some bearing on the complexity of the procedures, but the importance of planning is no greater for large estates than for those of modest size. In fact, the reverse is often true. Conserving 10 percent of a million dollar estate is certainly a worthwhile objective, but conserving 10 percent of a \$50,000 estate can be critical to the financial well being of surviving family members.

The legal assistance provider is most often concerned with the orderly and economical distribution of an individual's property to surviving family members. In many cases, however, this requires more than a carefully drafted testamentary instrument. A knowledge of the broader aspects of estate planning assures that the dispositive instrument(s) meet the client's desires.

#### **II. ESTATE PLANNING OBJECTIVES**

The wishes of the estate owner are the basis of any effective estate plan. Tax savings is a legitimate objective in planning an estate, but it is not the only consideration.

Within the framework of the client's objectives, the emphasis should be on simplicity, flexibility, and economy. A relatively simple and straightforward plan is more readily understood by the client and usually easier to revise in light of altered circumstances. Flexibility is essential--particularly for younger persons who will modify their plans periodically over the years. Economy is equally important. Any unnecessary expense causes a reduction in the income available to surviving family members and may make it impossible to retain the same standard of living following the client's death.

### III. ESTATE ANALYSIS

- A. General. A number of factors may cause the assets received by the beneficiaries to differ in character and value from the estate left by the decedent. These include Federal and state death taxes, administration costs, losses resulting from the forced liquidation of assets to meet liquidity requirements, and the loss of the decedent's management ability. Most estate planning techniques and procedures are designed to limit the adverse impact of these factors on an individual's estate.
- B. Federal Estate Tax. This tax is imposed upon the privilege of transferring property at death (whether the beneficiaries are designated by the decedent or by the laws of intestate succession). It is based upon the value of the entire estate left by the decedent (and cumulative taxable gifts made by the decedent during lifetime), rather than on the shares received by the respective beneficiaries.

The Tax Reform Act of 1976 established a unified transfer tax for the computation of both Federal estate and gift taxes and replaced the separate gift and estate tax exemptions with a unified credit. Under the Economic Recovery Tax Act of 1981, the unified credit increased annually until 1987 when it reached \$192,800. This credit completely exempts transfers up to \$600,000 in value from federal gift or estate tax; it provides an offset against total tax on taxable lifetime gifts and estate transfers. Thus, anyone can make a gift or bequest of up to \$600,000 to anyone else without paying gift or estate tax.

The unified credit has not increased since 1987. When one considers the effect of inflation, the unified credit has decreased. Each individual is entitled to the unified credit remaining at the time of his/her death. This is an important consideration when planning the estate of a married couple. Since a husband and wife each have a unified credit, together they will be able to transfer \$1,200,000 estate tax free if their estates are properly planned.

The taxable estate (including any lifetime taxable gifts) must exceed the exemption equivalent before a tax liability is incurred. Few estates of military personnel will exceed \$600,000. When examining the potential size of the estate, however, the combined assets of both spouses must be considered, and the face value of all life insurance will probably be included (if the client owns the policy or retains any incidents of ownership). This will generally result in a much larger potential estate than initially anticipated.

- C. **State Death Taxes.** There is little uniformity among state transfer tax systems. The tax rates are typically less than those imposed by the federal government. Because the exemptions are often less liberal, state death taxes create a heavier burden on smaller estates than the federal estate tax. A few jurisdictions follow the federal approach and impose a tax on the value of the entire estate. A greater number impose an inheritance tax--a tax on the right to receive property from a decedent's estate. State law must be reviewed to determine whether or not the inheritance tax applies to the proceeds of life insurance payable to named beneficiaries or survivorship interests in jointly owned property.

Nearly all states levy a "credit estate tax" or "pick-up tax" designed to absorb the amount of the federal estate tax credit allowed for taxes paid to the state. This tax may be in addition to, or in substitution for, any other state inheritance or estate tax. In the latter case, state death taxes may be ignored for tax planning purposes. If no federal estate tax is incurred, no state tax is levied. If a federal tax is imposed, the state tax offsets the federal tax so that the total tax remains the same.

- D. **Administration Costs.** Few estates of any size can be settled without incurring court costs, fees for the services of an attorney or other professional, and the commission and administrative expenses of the executor or administrator. These costs may be increased if the decedent owned property in two or more states requiring ancillary administration.
- E. **Forced Liquidation.** An executor or administrator may be forced to sell estate assets in order to obtain cash for the payment of taxes and other estate administration costs. Under these circumstances, it may be difficult or impossible to realize full value for the property sold.

Personal representatives normally select the "prime" assets of the estate for liquidation. These are the assets which can be converted to cash most readily and with the least shrinkage from their fair market value. They may also be the most desirable assets from the standpoint of the beneficiaries. As a result, the family may be left with a disproportionate share of speculative or unproductive property unsuitable to its needs.

- F. **Loss of Management.** The decedent's lifetime investment program may leave his or her estate with assets that are unproductive, speculative, or otherwise inappropriate for the needs of the surviving spouse and children. Rearrangement of the investment portfolio after death can be expensive and may result in sacrificing profits which could have been realized had the decedent lived.
- G. **Role of Planning.** The adverse effects of some of these factors can be minimized by careful planning. Because they can seldom be eliminated entirely, it is advisable to estimate and allow for shrinkage in the value of the decedent's estate.

An estate is normally thought of as a principal sum, while the needs of the family are usually expressed as a monthly income requirement. Comparison of the available funds with the required income is an essential step in completing a preliminary analysis of the estate. An individual who considers himself to be in relatively modest circumstances may find that his net estate will total \$50,000 or more. This sounds like a substantial amount but it may produce less than \$250 per month of income. This may be an inadequate supplement to other income available to the family including their own earnings, Social Security payments, and pension and retirement annuity payments. The planning process should also consider the consequences of the family's consumption of the estate principal. Additional life insurance is often recommended as the most practical means of assuring liquidity, offsetting anticipated shrinkage in value, and making up any deficit in projected income. The need for insurance should be reevaluated as individual investment portfolios increase.

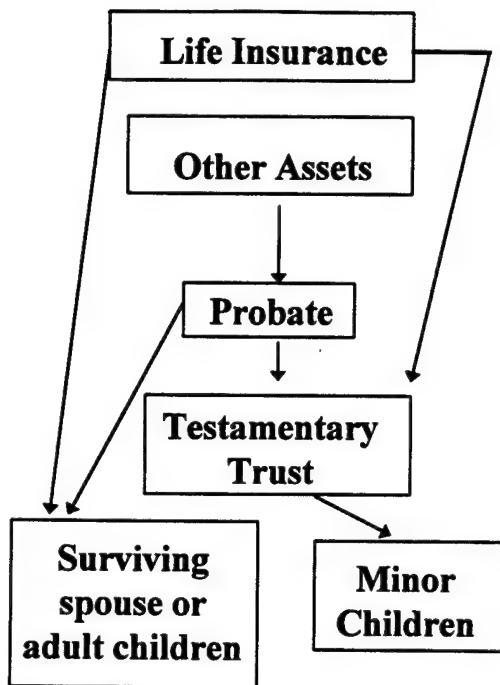
#### **IV. ESTATE TAX PLANNING**

- A. General. Liberalizations in the federal gift and estate tax laws since 1976 have made transfer taxes a moot issue for many military families. This simplifies greatly the work of legal assistance providers engaged in estate planning. Greater attention and expertise can be devoted to estate planning techniques beneficial to a substantial number of legal assistance clients, such as trusts for the benefit of minor children, without undue concern for adverse tax consequences.

Although the number of instances in which estate tax planning is required are relatively few, the consequences that follow from inadequate estate planning are severe. The lowest marginal tax bracket applicable to estates that are subject to tax is 37%. Even families with sufficient wealth to be subject to estate tax can ill afford the loss of tens of thousands of dollars that could have been saved with proper tax planning.

The legal assistance provider should recognize situations in which tax planning is necessary and understand basic estate tax planning principles and techniques

## Common Estate Plan



This illustrates the currently used and typical reciprocal will and trust instrument. Literally mirror what the other spouse does. Simple solution for most of the people, most of the time. Does not effectively plan to minimize estate taxes at death of second spouse (especially if combined estates exceed \$600,000)

- B. **Planning for the Unified Credit.** Effective use of an individual's unified credit is the single most important objective in estate tax planning. The unified credit offers the opportunity to completely exempt a substantial amount of wealth from gift or estate tax. The marital deduction, on the other hand, may only postpone the payment of estate taxes until the death of the surviving spouse.

The \$600,000 exemption created by the unified credit provides a bright line for determining whether an individual's estate may be subject to estate tax and appropriate planning should be initiated to minimize or eliminate the potential tax. The assets includable in the client's gross estate at death consist not only of property owned by the client, but also the face value of life insurance policies owned by the client on his or her life and pension or retirement benefits paid at or after the client's death. The legal assistance provider must also consider the likelihood of future appreciation in the value of the client's assets and the effects of inflation in determining whether tax planning is appropriate.

If the estate planning client is married, the \$600,000 tax planning threshold applies to the combined assets of both spouses, including insurance proceeds and retirement benefits for each of them. Typical estate planning for many military clients finds that the surviving spouse will inherit the entire estate of the first spouse to die, so that the combined wealth of both spouses will be subject to estate tax at the death of the survivor.

### EXAMPLE

Wife dies in 1994 leaving Husband \$1,200,000 outright. Wife's estate pays no tax because of the unlimited marital deduction. When Husband dies in 1995, however, his estate pays a tax of \$235,000 (\$427,800 tentative tax on \$1,200,000 estate minus \$192,800 credit = \$235,000 in tax). This can be illustrated as follows:

#### First Estate

\$1,200,000 to Husband
---------------------------

Qualifies for marital deduction; no federal estate tax.

When the Husband dies, his estate (assuming he made no taxable gifts during his life) is \$1,200,000. Only \$965,000 will pass to his heirs:

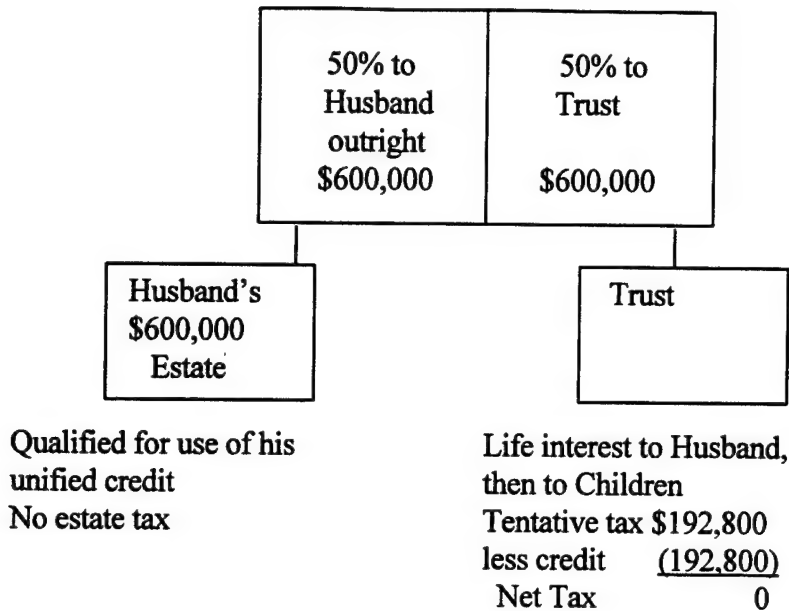
#### Second Estate \$1,200,000

80.42%	To heirs \$965,000	Federal Estate Tax	19.58%
		\$235,000	

### SIMPLE TAX PLANNING EXAMPLE

Wife dies leaving \$600,000 outright to Husband and the remaining \$600,000 of her \$1,200,000 estate to a trust, with Husband as income beneficiary and Children as remaindermen. Wife's estate again pays no tax, thanks to the combination of the marital deduction and the unified credit. Note, however, Husband's estate pays no estate tax either. The value of the property in trust, if properly structured, will not be in the Husband's estate, and Husband's credit will offset the tax on the \$600,000 that is included in his estate. Family tax savings is \$235,000. This is illustrated below:

First Estate  
\$1,200,000



The fundamental estate planning technique for a married couple involves the creating of a "bypass trust" or "unified credit exemption trust" at the death of the first spouse. This technique takes advantage of the separate \$600,000 unified credit exemption of each spouse so that the children or other beneficiaries may ultimately inherit up to \$1,200,000 without incurring federal gift or estate tax. The potential tax savings may be as much as \$235,000. (The trust in the illustration above is an example of a bypass trust.)

The bypass trust is funded with all or a portion of the deceased spouse's unused unified credit exemption without causing any estate tax. Because the interests of the surviving spouse as beneficiary of the trust are sufficiently limited, the trust assets are not included in the gross estate of the surviving spouse for estate tax purposes. In other words, the trust "bypasses" the taxable estate of the surviving spouse and the assets pass tax free to the children or other beneficiaries. The surviving spouse's own unified credit exemption may be applied to his or her separate property.

Obviously, the surviving spouse must forego ownership of the assets used to fund the bypass trust. However, the spouse may still receive substantial financial benefits from the trust without being deemed to have a general power of appointment over the trust assets which would cause the assets to be taxable at the spouse's death. The spouse may receive all trust income, and principal may be distributed to the spouse in the discretion of the trustee. The spouse may serve as sole trustee or as a co-trustee, but in such cases the discretion to distribute principal to the spouse must be limited to an ascertainable standard, such as the spouse's needs for support, maintenance, and health. The spouse may have the right to appoint principal of the trust during lifetime or at death, provided that the appointees



cannot include the spouse, the spouse's estate, the spouse's creditors or creditors of the spouse's estate. Finally, the spouse may have the right to invade the trust principal for his or her own benefit in an annual amount not to exceed the greater of \$5,000 or 5% of the value of the trust principal.

- C. **Planning for the Marital Deduction.** Beginning in 1982, qualifying transfers between U.S. citizen-spouses made during lifetime or at death became completely free of federal gift or estate tax. This meant that regardless of the size of the estate, if it is left to a spouse who is a U.S. citizen, there will be no federal estate tax on that initial transfer. (Similarly, an unlimited amount of gifts can be made during one's life to a U.S. citizen without incurring any gift tax.) This unlimited marital deduction is the second most important consideration in estate tax planning for a married couple.

Many spouses leave the bulk of their estates to the surviving spouse postponing federal estate taxes in the typical husband/wife situation until the death of the surviving spouse. If the surviving spouse has not remarried before death (thereby enabling him/her to use the unlimited marital deduction to the new surviving spouse) and the estate exceeds the amount shielded by the unified credit (usually \$600,000), the estate will be subject to federal estate tax.

The unlimited marital deduction assures that no estate tax need be paid at the death of the first spouse. It is incorrect to conclude, however, that all of the estate of the first spouse to die should pass to the survivor in a manner qualifying for the estate tax marital deduction. Assets that qualify for the marital deduction at the death of the first spouse will be subject to estate tax at the death of the survivor (or subject to gift tax if disposed of by the survivor during lifetime). The net effect may be only to postpone the tax until the death of the surviving spouse. One possible preferred plan is to fund a bypass trust at the death of the first spouse with estate assets having an aggregate value equal to the available unified credit exemption, and transfer the remaining assets to the surviving spouse in a manner qualifying for the estate tax marital deduction. This plan realizes the full tax savings of both spouses' unified credits and the benefits of tax deferral.

The deferral of all estate taxes until the death of the surviving spouse may actually result in greater total taxes than if a portion of the taxes were paid at the death of the first spouse. This result is attributable to the graduated gift and estate tax rates. If all the estate tax is paid at the death of the second spouse, a portion of the tax is likely to be paid at higher rates than if the tax burden had been allocated between the two estates. Offsetting this potential increased tax is the financial benefit provided by tax deferral. The surviving spouse will enjoy greater income after the death of the first spouse if assets are not consumed to pay estate taxes, and the inheritance of the children after the death of both spouses will be enhanced by the appreciation on the assets that otherwise would have been expended for taxes.

The ideal estate tax plan for a married couple would provide the option of tax deferral but retain the flexibility to reduce the marital deduction transfer at the death of the first spouse. This would allow the surviving spouse's life expectancy at that time to be taken into consideration in evaluating the probable benefits of tax deferral. Fortunately, this flexibility may be achieved in either of two ways. The spouse may be given the option to disclaim all or a portion of the marital deduction bequest, in which case the disclaimed property will be added to the other assets in the bypass trust. If the marital deduction bequest is in the form of a qualified terminable interest property (QTIP) trust, the executor of the deceased spouse's estate may elect to qualify less than the full amount of the trust for the estate tax marital deduction. The portion of the trust for which the election is not made will be subject to tax in the first estate but escape taxation at the death of the survivor in the same manner as a bypass trust.

The most typical transfers qualifying for the gift or estate tax marital deduction include outright transfers, general power of appointment trusts, and QTIP trusts.

1. Outright Transfer. Outright ownership of property passing to a spouse by gift, bequest, or operation of law is the simplest and most common form of marital deduction transfer. A transfer in trust rather than outright may be more appropriate if the recipient spouse is considered unable to properly manage the assets or if the transferor wants to guarantee the ultimate beneficiaries of the property at the spouse's death. The latter consideration is particularly important if the transferor has children by a prior marriage or is concerned about the possible remarriage of the surviving spouse.
2. General Power of Appointment Trust. Before the advent of the QTIP trust in 1982, the general power of appointment trust was the most frequently used marital deduction alternative to the outright transfer. This trust offers the opportunity of professional investment and administrative management for the trust assets on behalf of the spouse, but only limited control over the disposition of the assets at the surviving spouse's death. In addition, the assets held in trust at the spouse's death generally escape probate and its related expenses.

The general power of appointment trust requires that the spouse receive all the trust income at least annually. The spouse may, but need not, be authorized to receive distributions of principal in the discretion of the trustee. The spouse must be given a general power of appointment over the trust assets during lifetime, or more typically, by will. If the spouse fails to exercise a testamentary power of appointment, the trust assets pass as otherwise provided in the trust instrument.

One other advantage of the general power of appointment trust is the option to permit the spouse to make gifts of trust property to children or other

family members. These gifts may qualify for the gift tax annual exclusion discussed later and reduce estate taxes at the spouse's death.

3. QTIP Trust. The QTIP trust has probably surpassed the general power of appointment trust in popularity in recent years. This trust offers two unique advantages. The testator (or transferor in the case of an irrevocable QTIP trust created during lifetime) directs the disposition of the trust assets at the death of the spouse. This assures that the testator's children or other family members will be the ultimate beneficiaries of the trust. The second advantage is the trust's flexibility for purposes of the gift or estate tax marital deduction. The testator's executor (or the transferor in the case of an inter vivos trust) may elect to qualify all or any portion of the trust assets for the marital deduction. The portion of the trust for which the election is made will be included in the surviving spouse's estate for federal estate tax purposes. The remaining portion will be treated in the same manner as a bypass trust.

To qualify for the QTIP election, the trust must pay all its net income to the spouse at least annually, for his or her lifetime. Neither the spouse nor any other person may have a power to appoint the trust assets to any person other than the spouse during the spouse's life. If desired, the instrument may permit the trustee to invade the trust principal for the spouse's benefit. (It is recommended that any such invasion provision be limited to an ascertainable standard used in bypass trusts if the spouse is to be a trustee.)

The primary disadvantage of the QTIP trust is that the spouse is not permitted to make gifts to children or other beneficiaries from the trust principal.

- D. Typical Estate Plans. There are at least three different estate plans that incorporate the tax planning advantages of the bypass trust and the unlimited marital deduction. These include the disclaimer trust, the single QTIP trust, and the Marital Trust/Family Trust (or A/B Trusts).

1. Disclaimer Trust. The simplest estate plan that offers the tax planning benefits of both the bypass trust and the marital deduction is the disclaimer trust. The residue of the estate passes outright to the surviving spouse who is given the option of accepting the bequest or disclaiming all or a portion of the bequest. The will provides that any portion of the bequest disclaimed by the spouse passes into a bypass trust for the benefit of the spouse. Disclaimers must be accomplished in a timely manner.

The advantage of the disclaimer trust is that the surviving spouse can wait until the death of the testator to decide how much, if any, of the estate should be placed in a bypass trust to achieve the optimum tax savings. This is

especially beneficial when it is uncertain whether the spouses' combined estates will exceed the unified credit exemption, depending upon the appreciation of their assets or other factors. This is also a useful device for the spouse having the smaller estate if he or she predeceases the spouse with the larger estate.

The disadvantage of the disclaimer trust is that its success depends upon the tax planning sensitivity of the surviving spouse. A decision to disclaim any of the estate must be made in a timely fashion after the testator's death and before the surviving spouse has accepted the benefits of the estate assets in a manner that is inconsistent with the disclaimer. It is not surprising that few surviving spouses are willing to give up any financial benefits at this difficult time.

2. Single QTIP Trust. A more practical alternative to the disclaimer trust is the single QTIP trust. It offers the tax savings and tax deferral benefits of a bypass trust or a marital deduction trust, or both, depending upon the election made by the executor. To the extent an election is made, the trust assets will qualify for the unlimited marital deduction and be taxable to the same extent in the estate of the surviving spouse. The unelected portion of the trust is subject to estate tax at the death of the first spouse (and presumably sheltered from tax by the available unified credit), but escapes taxation at the death of the surviving spouse.

A potential disadvantage of the single QTIP trust is that all the assets are retained in trust for the spouse's lifetime even if it is determined that the tax savings of the bypass trust are not needed. On the other hand, the executor of the estate, if someone other than the surviving spouse, may be more objective in terms of making an appropriate election for estate tax purposes than the surviving spouse in the case of a disclaimer.

3. Marital Trust/Family Trust. The classic estate plan combines a marital deduction trust (or outright marital share) and a bypass trust. This plan is often referred to as the "A/B Trusts" or "Marital Trust/Family Trust." An amount equal to the unused unified credit exemption is placed in a bypass trust (the "B" trust or "Family Trust") and the balance of the estate passes in another trust qualifying for the marital deduction (the "A" trust or "Marital Trust").

Because of the flexibility afforded by two separate trusts or shares, this plan is especially appropriate when it is relatively certain that the estate of the deceased spouse will exceed the unified credit exemption. Marital deduction flexibility is achieved by providing that the surviving spouse may disclaim all or any portion of the Marital Trust, in which case the disclaimed assets will be added to the Family Trust. In the alternative, the Marital Trust

may be a QTIP trust which will allow the executor the option of making less than a full marital deduction election.

A variation of the two trust estate plan involves dividing the marital deduction portion into two separate trusts. This plan offers the benefits of a general power of appointment trust or outright marital share to permit the surviving spouse to make lifetime gifts to children or other descendants, and the estate tax flexibility of the QTIP trust. Because of the additional costs incurred in administering three separate trusts, this variation is advisable only for large estates.

## **V. GIFTS**

A carefully considered program of gifts to family members is another effective estate planning tool. Such a program should only be initiated in large estates unless it is motivated by some purpose other than tax savings. Where the estate is quite large, it is possible to make impressive savings without depriving the donor of funds he may later need for his own use.

Liberal exemptions and exclusions enable an individual to give away significant amounts of property without incurring any gift tax. An individual may give \$10,000 to any number of persons each year without paying a federal tax on the gifts. The donor's spouse may elect to "split gifts" in a particular year so that the donor can take advantage of the spouse's separate \$10,000 annual exclusion. Thus, for example, parents may be able to gift up to \$20,000 to a child per year tax free. Gifts of future interests, such as remainder interests passing in trust, do not qualify for the annual exclusion. In addition to the annual exclusion, an unlimited gift tax exclusion applies to certain tuition and medical care payments on behalf of an individual--regardless of the relationship of the donor and the person on whose behalf the payments are made.

Certain assets are especially suitable as gifts from a tax standpoint. Insurance policies on the donor's life are particularly appropriate gifts. The value of a policy for gift tax purposes is approximately equal to its cash surrender value (or unused premium cost for term insurance), but the potential reduction in federal estate tax is based on the proceeds payable at the insured's death.

Gifts of income-producing property to family members in a lower income tax bracket can in some cases reduce the total income taxes payable by the family unit. The opportunities for income-shifting have been largely curtailed by the Tax Reform Act of 1986. Investment income of children under age 14 in excess of \$1,200 per year is taxed at the marginal tax rate of the parents. Changes in the income tax laws applicable to trusts have eliminated the income tax benefits of reversionary trusts and spousal remainder trusts.

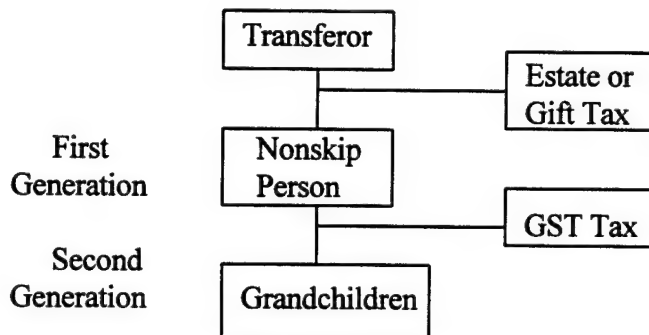
State laws should be reviewed carefully before initiating a gift program. Residents of community property states in particular should consider the specific requirements of their jurisdictions before attempting to convert community property into the separate property of one of the parties.

## VI. GENERATION-SKIPPING TRANSFER TAXES

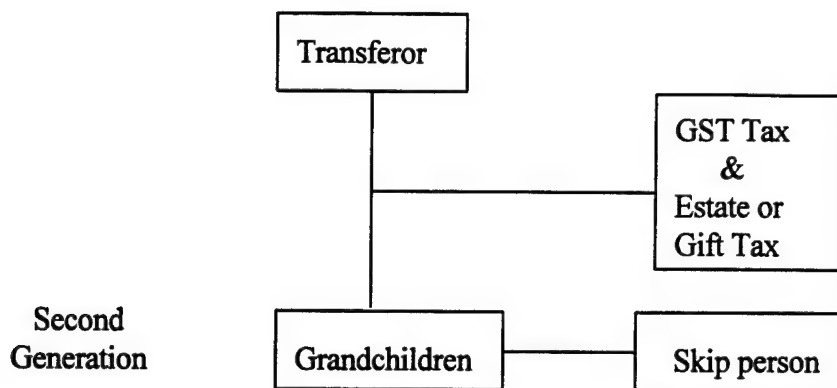
The Tax Reform Act of 1986 (TRA '86) repealed retroactively the generation-skipping transfer tax introduced in 1976 and substituted a somewhat simpler but more far-reaching tax. The new tax is intended to rectify the perceived inequity that results when wealth is transferred to beneficiaries that are two or more generations younger than the transferor. If only one tax were imposed on the transfer, the property would escape the taxation that would otherwise be due at the death of the beneficiary only one generation younger than the transferor.

Fortunately, the new tax allows each individual a lifetime exemption of \$1 million, similar to his or her separate unified credit exemption. Obviously, the legal assistance provider will not need to consider the possible impact of generation-skipping transfer (GST) taxes except in cases where the client has substantial wealth. On the other hand, if a generation-skipping transfer exceeds the transferor's available exemption and any applicable exclusion, the combined gift or estate tax and GST tax (GSTT) may exceed the total value of the transferred assets.

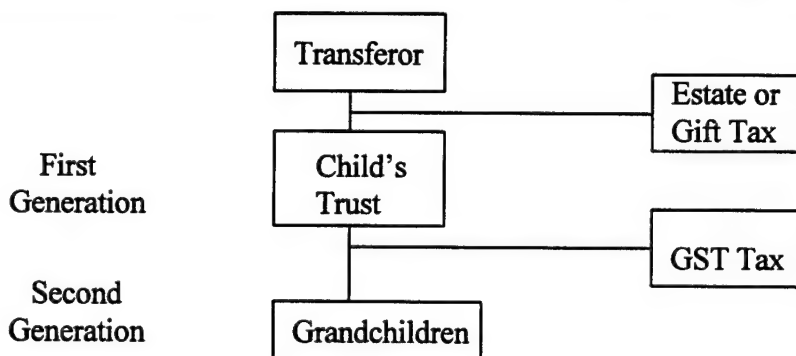
The GST is a tax on property transfers made from one generation to a later generation where at least one generation intervenes between the transferor's generation and the recipient's. Thus, the GSTT complements the estate and gift tax by ensuring that at least one tax is imposed for every generation through which property is passed.



Below is an illustration of how the GSTT and the estate or gift taxes apply to direct transfers from a transferor to a grandchild where the transferor's child (parent of the grandchild) is still living when the transfer is made. As you can see, such direct transfers to "skip persons" (i.e., individuals who are members of a generation that is at least two generations younger than the transferor's) may be subject to the GSTT and estate or gift taxes. Note, however, that if there is no gift tax because of the \$10,000 per person annual gift tax exclusion, then there is also no GSTT.



The GSTT also reaches transfers in trust. In the example below, the GSTT is imposed when the children's trust terminates and distributes to the transferor's grandchildren.



The rules governing the application of the GST tax and the options available for minimizing the tax are exceedingly complex. As a general rule, if the combined assets of a married couple exceed \$1 million and the estate plan includes potential benefits for grandchildren or other persons at least two generations younger than the testator and his or her spouse, the legal assistance provider should be alert to the possible application of the GST tax and advise his clients accordingly.

## VII. JOINT TENANCY

Joint ownership with right of survivorship is a popular method of holding title to the family home and other types of property. Title to such jointly held property passes to the survivor by operation of law at the death of one joint tenant.

Although many advantages are claimed for the joint tenancy arrangement, some of these may be illusory. For example, many people believe that because jointly held property passes to the survivor outside the probate estate, the value of the asset is not included in the decedent's taxable estate. Although that belief may be true in the case of some state inheritance taxes, one-half of the value of the property held by spouses jointly with a right of survivorship will be included in the estate of the first to die for federal estate tax purposes.



Perhaps the principal disadvantage of joint tenancy arrangements is that the jointly owned assets will not be available to fund a bypass trust that may produce significant estate tax savings at the death of the surviving spouse.

## VIII. WILLS AND TESTAMENTARY TRUSTS

The last will and testament of a decedent normally is regarded as the primary dispositive instrument of his estate. In small estates (and occasionally larger ones), the bulk of the decedent's assets may pass to the wife and children as surviving joint tenants, as named beneficiaries under life insurance policies and retirement plans, and by operation of law. This does not detract from the desirability of having a will, but it does underscore the necessity for coordinating its provisions with those other benefits to which surviving family members may be entitled.

In addition to its role as a dispositive instrument, a will can serve other valid functions. For the young family in the military, a major reason for having a will may be to appoint a guardian to have custody of minor children. Other persons may use a will to grant broad powers to their executors, and still others may use a will to avoid estate taxes. Perhaps the most important reason for a soldier to have a will is to provide for the financial security of their children through the use of trusts or custodial accounts.

Estate owners can, if they wish, leave everything they own to their families without restrictions of any kind. This procedure has the advantage of simplicity, and may be a satisfactory arrangement if the estate owner has complete confidence in the family's judgment and experience in financial matters. The disadvantages of unrestricted bequests are readily apparent. There are no safeguards against the consequences of an unwise second marriage, reliance upon unsound investment advice, or general improvidence on the part of estate beneficiaries. In effect it exposes the entire estate to hazards which may defeat the testator's expectations. If the beneficiaries are minors or incapacitated, the bequests will be subject to the expense and inflexibility of legal guardianships.

Estate owners may be tempted to impose restraints on their beneficiaries' access to estate assets. By the severance of joint tenancies, the creation of legal life estates, and the adoption of restrictive settlement options on insurance policies, the estate owner may limit the family to the income or use of the assets constituting the estate and defer their right to dispose of the assets themselves. This provides some assurance that the principal of the estate will not be dissipated, but it offers little or no flexibility for meeting emergencies. Major illnesses, long term disabilities, increased costs of higher education, and continued inflation are some of the factors which make it dangerous to rely upon this approach.

The remarkable versatility of the modern trust makes it adaptable to virtually any situation where immediate and outright ownership of estate assets is undesirable. A trust makes it possible to separate the responsibilities of property ownership from the benefits of ownership.

Particular care should be exercised in the selection of a trustee. A corporate trustee can provide experience, impartiality, and continuity of existence. An individual can provide greater familiarity with the family situation. A combination of an individual and a bank or trust company



as co-trustees offers the advantages of each but may result in increased fees. Consideration must be given to the type of services desired, their cost, and state restrictions as to who may act as fiduciary.

The trustee may be given discretionary authority to accumulate trust income or to distribute it, equally or unequally, among various beneficiaries. This discretion may be limited by some external standard related to the beneficiaries' needs or other sources of income, but such restrictions are not required. Unrestricted discretion permits the trustee to consider not only the financial situation of the beneficiaries but also the tax consequences of the distribution. The discretionary authority to "sprinkle" income among several taxpayers, or to accumulate it in the trust, enables the trustee to minimize the total tax attributable to such income. The potential income tax savings, however, have been significantly curtailed by reductions in the tax rates and other changes promulgated by TRA '86.

To the extent the trustee exercises this discretion as the testator would have wished, the testator has preserved a "second look" at the distribution plan devised before his death. There can never be complete assurance that the trustee will exercise his discretion exactly as the testator would have preferred, but the arrangement does offer flexibility to meet contingencies such as catastrophic medical expenses.

The advantages of a contingent trust for children after the death of both spouses is illustrated by the hypothetical case of a husband and wife with sons 14 and 22 years of age. The older son has completed college and is self-supporting. If they live, the parents expect to provide the same support and educational opportunities for the younger son. This plan can be carried out by the survivor even if one parent dies during the next few years. If both parents die during the minority of the younger child, however, the estate would typically be divided equally between the sons, and the younger boy would be placed at a financial disadvantage when compared with his older brother. His share of the estate would be reduced by the costs of support and education which have already been conferred upon the older son by the parents.

The contingent trust is probably the best means of substituting "equity" for "equality" in this situation. The trustee could be directed to hold the entire estate (including life insurance proceeds payable to the estate or to the trustee as contingent beneficiary) as a single fund for either a specific period of time or until the younger son reaches a designated age. During this period, the trustee has discretionary authority to distribute income and principal for either son on an "as needed" basis. At the end of the period the trust is divided into equal shares which may be distributed to the sons or retained by the trustee as two separate trusts.

## **IX. INTER VIVOS TRUST AGREEMENTS**

The estate planning benefits provided by testamentary trusts may also be achieved by the use of a revocable trust agreement. A revocable trust is particularly beneficial for individuals, such as service members, who frequently change their residence or legal domicile. The same dispositive provisions may be included in the trust agreement to take effect after the grantor's death. Under the terms of the instrument, the grantor retains the right to amend or revoke the agreement before his death, providing the same flexibility as a will.

The revocable trust agreement may be either funded or unfunded. A funded trust with an independent trustee may relieve the grantor of the burden of managing the investment assets contributed to the trust, and give him the opportunity to appraise the trustee's performance. A funded revocable trust offers few, if any, income or estate tax advantages. All the assets held in trust at the grantor's death or payable to the trustee are includable in the grantor's gross estate for federal estate tax purposes.

The unfunded revocable trust is more commonly used. The trust is created by contributing a nominal amount of cash, or perhaps a savings bond, to the trust or by designating the trustee as primary beneficiary of the grantor's life insurance policies. The trustee typically has no investment or administrative responsibilities during the grantor's lifetime.

Whether funded or unfunded, the revocable trust does not eliminate the need for a will. In most cases the residue of the estate passes under the will to the trustee serving under the trust agreement by use of a "pour over" provision. As a result, the assets of the trust, the life insurance proceeds, and the residue of the probate estate are consolidated, resulting in more efficient and better coordinated administration.

In spite of widely publicized literature advocating the revocable trust as a means of "avoiding probate," it seldom accomplishes this purpose. The primary reasons for the probate procedure (payment of debts, determination and settlement of tax liabilities, and the orderly winding up of the decedent's business affairs) are not eliminated by the creation of a trust. The revocable trust only avoids probate for assets used to fund the trust during the grantor's lifetime and insurance proceeds or other benefits payable directly to the trustee at the grantor's death. Avoiding probate costs may be one reason for establishing a trust, but should seldom be the only reason for doing so.

Irrevocable trusts created during the grantor's lifetime are used primarily to achieve specific tax advantages without placing outright ownership and control of the property in the hands of the beneficiary. The grantor may reduce his gross estate by creating an irrevocable trust of certain property and by retaining no control or interest for himself or for his estate. Creation of such a trust is usually treated as a gift for federal gift tax purposes. Depending on the terms of the trust instrument, a contribution to the trust may or may not qualify for the gift tax annual exclusion.

The income from irrevocable trust property, if the trust is properly drafted, is generally taxed to the trust or to the beneficiary rather than to the grantor. The opportunity for substantial income tax savings by the use of irrevocable trusts has been virtually eliminated by income tax changes under the Tax Reform Act of 1986.

## **X. LIFE INSURANCE**

Estate owners and their advisers may desire to consider certain conservation features of life insurance in designing estate plans. At the outset, beneficiary designation should be reviewed with the client. Clients who have directed their SGLI benefits to be distributed "by law" should be advised of the effect this direction may have on the distribution of SGLI proceeds. Army policy on

SGLI changed in 1993 to preclude use of the "by law" designation. Every servicemember seen for a will by Army legal assistance attorneys must be counseled on the various SGLI designations and their advantages and disadvantages.

The method selected for the distribution of life insurance benefits is nearly as important as the amount of the proceeds. If the proceeds are made payable to a trustee or the executor of the insured's estate, a lump sum payment is normally contemplated. When the designated beneficiary is an individual, however, consideration should be given to the choice of settlement options available under the contract. Policies issued by most companies give the insured (and sometimes the beneficiary) at least three alternatives: have the proceeds held by the company at interest; have the proceeds (with interest) paid out over a specified period of time in installments; or have the proceeds applied toward the purchase of an annuity for the beneficiary's lifetime. Payment of the insurance proceeds in a lump sum to a trustee under a will or trust agreement may be preferable to these settlement options.

As a general rule, the insured should select an option which makes a substantial amount of income available to the family in the years immediately following death, even at the risk of providing inadequate income for the surviving spouse in later years. There are several reasons for this recommendation. First, the financial needs of the family at this time are likely to be relatively heavy. The support and education of minor children will be a matter of primary concern to the surviving spouse who may find it difficult to obtain employment compatible with parental responsibilities.

Although it may be difficult to predict the family's income requirements accurately, the estate owner's life insurance program can be tailored to the estimated needs. It can be revised as often as necessary without requiring changes in other dispositive instruments. In addition, the estate owner is free to invest in non-liquid assets or to make long-term commitments without undue concern about the "convertibility" of these assets into liquid and income producing property in the event of his or her premature death.

Occasionally an estate owner will want a specific asset of his or her estate to pass to a child immediately at death. Business interests, farms, valuable heirlooms, collections which have substantial intrinsic value, and other items of a similar nature are sometimes earmarked in this manner. If such a gift leaves insufficient assets in the estate to provide adequately for the support of the surviving spouse or other family members, life insurance can be used to make up the deficiency. Policies may also be obtained to equalize gifts among the children in situations of this kind.

Life insurance should also be considered as a possible solution to the difficult problem of providing for the financial well-being of a handicapped child. In the absence of a trust, the annuity provisions available under most insurance contracts can be used to guarantee a life income for the child. The regularity of this income and the fact that it cannot be outlived can be of greater importance to the welfare of the child than the size of the income. Of course, inflation may reduce the purchasing power of any income payable over an extended period of years.

As a part of the estate planning process, the ownership of existing and additional insurance should be reviewed. The proceeds of any policies in which the insured has any incidents of ownership will be included in his gross estate for federal estate tax purposes. Vesting ownership in

a beneficiary is frequently suggested as a means of avoiding this result. This is an appropriate procedure for some cases, but the insured should be fully aware that there may be gift tax consequences to the transfer of the policies and subsequent payment of insurance premiums. Furthermore, the insured will be unable to exercise any ownership rights under the policy. Because of the unlimited marital deduction there is no advantage to transferring insurance ownership to a spouse. In fact, such a transfer may be detrimental to the client's estate plan since the proceeds can not be used to fund a bypass trust.

## **XI. PERIODIC REVIEW**

Regardless of how expertly prepared and perfectly coordinated an estate plan may be, it should be reviewed frequently to take into account any changes in the estate owner's objectives. Revisions may also be required as a result of changes in family circumstances, modification of military benefit programs, changes in tax law, a change of residence or domicile, retirement from military service, or inheritance of property. This review should be suggested by the legal assistance provider whenever these or other factors indicate that the existing plan may be outdated. Additionally, at the time the legal assistance provider prepares a will or estate plan for a client, he or she should advise the client of the need for periodic review of the plan and that the legal assistance office will not be able to monitor the client's future needs due to change of personnel. The burden should be placed squarely on the client to initiate periodic review of his or her estate plan.

The preparation of a comprehensive estate plan requires familiarity with a number of specialized fields of knowledge. Legal assistance providers should urge soldiers to obtain the advice and assistance of professional counsellors in matters relating to trusts, life insurance, and investments.

## **XII. POST MORTEM ESTATE PLANNING**

Important estate planning opportunities remain even after the testator's death. The opportunities available at this time include estate tax savings, income tax savings for the estate, and income tax savings for the individual beneficiaries.

Since a detailed treatment of the methods and alternatives of post mortem planning is outside the scope of this chapter, an abbreviated outline of the major elections is included.

### **A. Estate Tax Savings**

1. The executor should review the decedent's records for lifetime transfers.
2. The surviving spouse may elect to take an elective share of the estate if this will increase the amount of the marital deduction.

3. The surviving spouse may disclaim a portion of the estate to reduce or eliminate the marital deduction.
4. A disclaimer may be made by another person in favor of the surviving spouse to increase the marital deduction.
5. The executor may elect to value property for federal estate tax purposes at the alternate valuation date.
6. The executor should consider various deductions which are allowed on estate and income tax returns.
7. The executor or trustee may satisfy a marital deduction share with non-appreciating (nongrowth) assets to minimize additional estate tax at the surviving spouse's death.
8. The executor must elect between estate tax and income tax deductions for certain administration expenses.
9. A beneficiary may disclaim property when a charity is the successor by terms of the will to obtain or increase a charitable deduction.
10. Certain Treasury bonds held by the decedent, referred to as "flower bonds," are redeemable at par at the death of the owner for the purpose of applying the proceeds to payment of the federal estate tax.

**B. Income Tax Savings for the Decedent**

1. A joint return for the decedent and surviving spouse may be filed for the year of death if the surviving spouse does not remarry before the close of the tax year.
2. Medical expenses of the decedent may be deducted on the decedent's final income tax return notwithstanding that they are paid after death.

**C. Income Tax Savings for the Estate and Beneficiaries**

1. The executor must elect between estate tax and income tax deductions for certain expenses of estate administration.
2. The estate may adopt a fiscal year other than December 31 to provide income tax deferral for beneficiaries.
3. Undistributed income in each year may be taxed separately to the estate. Throwback rules apply to trusts but not estates, so later distributions of accumulated income do not result in tax to the beneficiaries.

### **XIII. SMALL ESTATE PRACTICE AND PROCEDURE**

When an estate is of limited size the functions of formal probate administration are arguably unnecessary. It is not difficult to collect the estate assets, simplifying one of the large burdens in the settlement of an estate. The distributees are usually the spouse, children or immediate family of the decedent. The decedent's debts are often minimal and can be provided for without prejudice to the creditors. Finally, there are usually no estate or inheritance taxes imposed on the estate or beneficiaries.

In an increasing number of states, these "small estates" may be released from probate with little or no intervention by the probate court. Less court involvement means reduced court costs and quicker access for devisees and heirs to the estate property.

The measures adopted by state legislatures for expediting the distribution of small estates vary. The Uniform Probate Code (adopted in substantial part in 15 states) provides good examples of two common procedures.

**A. Collection by Affidavit**

1. If the net probate estate of the decedent is less than a certain dollar amount (\$5000 under U.P.C. § 3-1201) and no person, within a certain number of days (30 days under U.P.C. § 3-1201), has petitioned the probate court for the appointment of a personal representative, collection by affidavit may be appropriate.

2. If collection by affidavit is appropriate, an individual who believes that he or she is entitled to certain personal property may prepare an affidavit to that effect. The affidavit allows the holder of the property to transfer the property to the affiant. If the affiant was not legally entitled to the property, the affiant is responsible to the person who had legal right to possession of the property. If the transferor relied in good faith on the affidavit, the transferor is released from any further liability based on the transfer.
3. In some states which allow for collection by affidavit, there are further restrictions on its use. Some allow only spouses and children to collect by affidavit; some allow only certain personal property (e.g., bank accounts) to be collected by affidavit; and others require some minimal court involvement (e.g., filing of the affidavit with the court).

#### B. Summary Administration for Small Estates

1. Where a personal representative has been appointed, he or she may employ a streamlined administration on certain small estates. Small estates subject to this "summary administration" are generally limited to estates which have no assets with which to pay unsecured creditors, heirs, or devisees. More specifically, if the value of the entire estate, less liens and encumbrances, does not exceed the amount payable in the form of family allowances, homestead allowance, exempt property, administration expenses, and funeral/last illness expenses, then summary administration may be used (U.P.C. § -1203).
2. Under summary administration, the representative immediately pays out the estates assets (in order of priority set forth above) and files a final accounting, or closing statement, with the probate court (U.P.C. § 3-1204). Intermediate steps required under the formal probate process may be avoided, including such steps as the notice to creditors, the waiting period for creditors, the formal inventory and appraisal, and the court decree of distribution.

### XIV. CONFLICTS OF INTEREST

Although attorneys routinely advise married persons concerning estate planning, there are dangers in joint representation. Before representing both spouses, the attorney should advise the spouses of the risks of joint representation and obtain both spouses' consent. The parties should be advised that a conflict of interest concerning property distribution could arise in the future which would require the attorney to withdraw from the representation. This often occurs when the spouses have separate families by prior marriages. Additionally, the parties should be informed that



communications they make to the lawyer will not be protected from disclosure by the attorney-client privilege if, for instance, there is subsequent litigation between the parties. Each client must be willing to waive his or her individual right of having the lawyer guard his or her confidences. Each must be willing to authorize the lawyer to fully disclose to the other party all of the assets involved, as well as to disclose the terms of each party's will.

Once the parties consent to this, the lawyer may represent both parties. The lawyer, however, should still be alert to the possibility of conflicts in the future. Some authors suggest that a letter be sent to the clients after the initial interview to document this advice. Beginning on page 29, are two sample letters which may be tailored to individual client situations. Figure 1 is a suggested form letter which may be used for such purposes. Figure 2 is a form letter suitable for dual representation when estate planning clients have separate families.

## **XV. STATUTORY WILLS**

- A. Judge Advocates practicing in the Legal Assistance arena are prohibited from preparing "fill-in-the-blank" wills unless the testator's state of domicile statutorily authorizes such a will. A few states (e.g., California, Maine, Michigan, and Wisconsin) have developed their own unique statutory wills which are reprinted in the summary of that state's laws. A few other states (e.g., Massachusetts and New Mexico) have adopted the Uniform Statutory Will Act.
- B. Uniform Statutory Will Act (8B U.L.A. 383).
  - 1. The Uniform Statutory Will form requires the testator to fill in blanks identifying the testator and identifying the testator's nominees for personal representative, trustee, and guardian of minor children (if any). After these blanks are completed, the remainder of the form is devoted to short testimonium, attestation, and notarization clauses. The will is self-proving.
  - 2. There are no dispositive provisions on the form. All dispositive provisions are incorporated by reference to the Act. The Act provides that if there is a surviving spouse and no children, the spouse takes the estate. If there are children, but no spouse, the children take the estate (in trust, if there are minor children). If both children and spouse survive the testator, then the spouse will take the residence and the greater of one-half the remainder of the estate or of \$300,000. After the spouse's share of the estate is deducted, the balance of the estate is then placed in trust with the income for life to the spouse and the remainder to the children.



3. The Act does provide for some flexibility. For example, a testator can dispose of part of his property by traditional will and part by Uniform Will, he can insert specific bequests into the Uniform Will, and he can vary the timing of trust termination and distribution.
4. The Uniform Statutory Will (and other statutory wills) may be used to advantage when will-generating computer programs (such as the Minuteman and Clipper will programs on LAAWS) are unavailable or overloaded. Additionally, the Uniform Statutory Will has some tax advantages over a will produced by either of the LAAWS Programs. If the combined gross estates of the soldier and the soldier's spouse might exceed six hundred thousand dollars, wills prepared on either of the LAAWS programs may not protect the estate from federal estate taxes upon the death of the second-to-die spouse. The Uniform Statutory Will provisions, however, were drafted so that, for larger estates, some of the assets of the first spouse to die would be placed in a QTIP trust. Depending on the type and distribution of assets between the spouses at the time of death, Uniform Statutory Wills could protect as much as 1.2 million dollars of combined assets from any federal estate taxation.

UNIFORM STATUTORY WILL

I, \_\_\_\_\_, of the City of \_\_\_\_\_, and State of \_\_\_\_\_, declare this to be my Last Will and hereby revoke all of my prior wills and codicils.

1. I direct that my testamentary estate be disposed of in accordance with the \_\_\_\_\_ Uniform Statutory Will Act, as in effect on the date of execution of this will.

2. I appoint \_\_\_\_\_ as personal representative of my estate under this will. If a trust becomes applicable under the provision of the Act, I appoint \_\_\_\_\_ as trustee hereunder. If either of them does not serve, or at any time ceases to serve, in either capacity, I appoint \_\_\_\_\_ to serve in the vacant capacity or capacities. I appoint \_\_\_\_\_ as guardian and conservator of my minor children.

I, \_\_\_\_\_, the testator, sign my name to this instrument this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I (sign it willingly) (willingly direct another sign for me) (cross out the one of these two alternatives that is inapplicable), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_ Testator

We, \_\_\_\_\_ and \_\_\_\_\_ the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as (his) (her) (cross out the inapplicable word or phrase in each of these instances), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_ Witness

\_\_\_\_\_ Witness

State of \_\_\_\_\_  
County of \_\_\_\_\_

Subscribed, sworn to and acknowledged before me by \_\_\_\_\_, the testator, and subscribed and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

(Seal)

(Signed) \_\_\_\_\_

\_\_\_\_\_  
(official capacity of officer)

## XVI. REFERENCES

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## FIGURE 1

### SAMPLE DUAL REPRESENTATION LETTER FOR NEW ESTATE PLANNING CLIENTS

Re: Your Estate Plan

Dear Mr. and Mrs. \_\_\_\_\_

This will confirm the following:

1. You have requested me to represent each of you and to advise you on certain estate planning matters.

2. It is contemplated that the matters to which my representation will extend will include the following:

[Choose from the following or modify as scope of representation dictates]

a. Analysis of your existing wills, codicils, trust agreements and property agreements, if any;

b. Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;

c. Analysis of all property now owned by each of you, including consideration of its fair market value and the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;

d. Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death;

e. Analysis of the tax impact of such disposition and recommendations for alternative dispositions; and

f. Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.

3. I have advised each of you that, during the course of the estate planning work, conflicts may arise between you with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent me from continuing to represent both of you. However, during the course of the estate planning, issues may arise about the ownership of certain property, or other conflicts of interest between you may arise. Ordinarily, under such circumstances, one attorney cannot represent both

of you. The reason it may be better for each of you to have separate independent counsel is to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested me, with a full understanding of the advantages of independent counsel, to represent both of you in the above matters.

4. Although I doubt that it will happen, if conflicts arise between the two of you of such nature that it is impossible in my judgment for me to perform my obligations to each of you in accordance with this letter, I will withdraw from all further representation of both of you in this matter and advise one or both of you to obtain independent counsel.

5. You have each agreed that there will be complete and free disclosure and exchange of all information that I receive from either or both of you in the course of my representation. You have each agreed that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Sincerely,

[Signature of attorney;  
typed name below]

APPROVED THE \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of husband; typed name below]

[Signature of wife; typed name below]

## FIGURE 2

### **SAMPLE DUAL REPRESENTATION LETTER FOR EXISTING ESTATE PLANNING CLIENTS WITH SEPARATE FAMILIES**

Dear \_\_\_\_\_:

This letter is written to you in order to insure, as much as we can insure, the validity and objective independence of the advice, counseling, and planning that I have given or done for each of you through the years. I have, of course, represented each of you particularly in the planning of your respective estates, which planning provides for your respective separate families.

Matters to which such representation has extended, and is contemplated will extend, include the following:

1. Analysis of your wills, codicils, trusts, and property agreements, if any.
2. Analysis of the assets owned by each of you, including consideration of their value and the nature in which title is or should be held, and the categorization of such assets as separate or community property.
3. Discussions about the manner in which you wish to dispose of such property.
4. Analysis of the tax impact of such disposition and recommendations relative thereto.
5. Preparation of the documents necessary to accomplish the desired disposition.

We have talked from time to time about differences that may arise between you with respect to the ownership of your property and its desired disposition, particularly in view of your respective separate families. Such differences, under our ethical rules, do not prevent me from continuing to represent both of you. Of course, if conflicts of interests arise, ordinarily one lawyer cannot represent both of you, and it might be preferable for each of you to have separate independent counsel so as to avoid the possibility that advice to one is influenced by representation of the other. Nevertheless, you have expressed now and during the years, your continued interest in having me represent both of you, notwithstanding the foregoing caution.

Although it is doubtful that it will happen, if conflicts do arise of such a nature that it is impossible for me to perform my obligations to each of you, I would withdraw from continued dual representation and advise one or both of you to obtain independent counsel. It is implicit in such dual representation that there will be a complete and free disclosure and exchange of all information that I receive from either one of you with the other.

I am sorry to belabor this point, but increasing attention is being given these days to the subject of dual representation and potential conflicts of interest. Assuming that you are satisfied with my continuing representation of each and both of you, and mindful of what I have said above, I would appreciate your each signing the enclosed copy of this letter and returning it to me for placing in our files. A previously addressed and post marked envelope is enclosed for your convenience.

Should you have any questions concerning the purpose of this letter or any aspects of it, please feel free to call me.

Sincerely,

(Name of attorney)

I have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by you from either one of us, with the other one, and consent to you representing each and both of us in the aforementioned estate planning services.

Dated: \_\_\_\_\_, 19 \_\_\_\_\_

\_\_\_\_\_  
(Husband)

\_\_\_\_\_  
(Wife)

**FIGURE 3****UNIFIED GIFT & ESTATE TAX RATE SCHEDULE**

<b>COLUMN A</b>	<b>COLUMN B</b>	<b>COLUMN C</b>	<b>COLUMN D</b>
<b>Taxable amount over</b>	<b>Taxable amount not over</b>	<b>Tax on amount in Column A</b>	<b>Rate of tax on excess over amount in Column A</b>
<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>Percent</b>
0	10,000	0	18
10,000	20,000	1,800	20
20,000	40,000	3,800	22
40,000	60,000	8,200	24
60,000	80,000	13,000	26
80,000	100,000	18,200	28
100,000	150,000	23,800	30
150,000	250,000	38,800	32
250,000	500,000	70,800	34
500,000	750,000	155,800	37
750,000	1,000,000	248,300	39
1,000,000	1,250,000	345,800	41
1,250,000	1,500,000	448,300	43
1,500,000	2,000,000	555,800	45
2,000,000	2,500,000	780,800	49
2,500,000	3,000,000	1,025,800	53
3,000,000	....	1,290,800	55



### Using the Unified Rate Schedule

Assume you are single and have a taxable estate of \$700,000. Look in Column A until you see "Taxable amounts over \$500,000" and in column B, "Taxable amounts not over \$750,000." In column C, you see that the tax on \$500,000 is \$155,800. In column D, you see that the excess amount over \$500,000 is taxed at a 37% rate;  $\$700,000 \text{ minus } \$500,000 = \$200,000$ . A tax of 37% on \$200,000 is \$74,000. Add that amount to \$155,800 to get the tentative tax of \$229,800. This amount is reduced by the unused unified credit, \$192,800. Thus, estate tax liability here is \$37,000.

This same tax table is used to determine gift tax liability. Assume you make a single gift of \$200,000. The tax would be computed as follows: First, deduct the \$10,000 annual per donee exclusion from the \$200,000. The tax on the remainder (\$190,000) is \$38,800 (the tax on \$150,000) plus \$12,800 (32% of \$40,000). The total tentative tax is \$51,600. If you have previously used your unified credit, you will owe \$51,600. If you have not used any of your unified credit, you pay no tax on this gift, instead using \$51,600 of your unified credit, leaving a \$141,200 credit remaining to offset future gift or estate taxes.

**FIGURE 4**  
**NONRESIDENT NONCITIZEN SURVIVING SPOUSES—**  
**ESTATE & GIFT TAXATION RULES SUMMARIZED**  
**DECEDENT'S ESTATE TAX**

**The Marital Deduction and the Noncitizen Surviving Spouse.** Because of the marital deduction, a decedent may give his entire estate (even one valued at several million dollars) to his surviving spouse without incurring any federal estate tax. The marital deduction reduces the gross estate by the value of the property that is in the gross estate passing to the surviving spouse (IRC § 2056(a)). The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) limits the marital deduction when the surviving spouse is not a U.S. citizen. IRC § 2056(d)(1) now disallows the marital deduction where the surviving spouse is not a U.S. citizen *unless* the property passes to the surviving spouse in a "qualified domestic trust" (QDOT) or the surviving noncitizen spouse becomes a U.S. citizen before the date on which the decedent's estate tax return is filed (IRC § 2056(d)(4)). This limitation also applies even if the property is owned jointly with right of survivorship (IRC § 2056(d)(1)). This means that less than the full value of property owned jointly will be included in the decedent's gross estate for estate tax purposes only to the extent of the noncitizen spouse establishes contribution to the property's acquisition.

For a decedent whose surviving spouse is a noncitizen to use the marital deduction, the property must pass in a QDOT or be placed in a QDOT before the date on which the decedent's estate tax return is filed (IRC § 2056(d)(2)). QDOT trust rules are in IRC § 2056A:

1. The trust must require that at least one Trustee of the trust be an individual citizen of the U.S. or a domestic corporation.
2. The surviving spouse must be entitled to all income from the trust, payable at least annually.
3. The trust must meet the requirements of regulations to insure the collection of estate tax from the trust.
4. The executor must make an election on the estate tax return claiming the marital deduction with regard to the trust.

**Planning Thoughts.** If the noncitizen spouse acquires U.S. citizenship (even while holding foreign citizenship) property passing to the surviving spouse qualifies for the marital deduction without a QDOT. This does, however, subject the former noncitizen surviving spouse's worldwide estate to U.S. estate tax, although there will be a credit for any foreign estate tax paid. Before advising a noncitizen spouse, consider any tax treaties and be sure to check for any foreign laws in the noncitizen spouse's country that might penalize the surrendering of foreign citizenship solely for estate tax purposes.

**Estate Tax.** For a *nonresident* who is not a U.S. citizen, only the value of his property located in the U.S. at death is subject to federal estate tax. The gross estate is determined in the same manner as the gross estate of a U.S. citizen or resident, without regard to the location of the property. Only the part located in the U.S. however, is subject to the federal estate tax (IRC §§ 2103, 2104).

Unlike U.S. citizens and residents who have a unified credit of \$192,800 (IRC § 2010), nonresidents have a unified credit of only \$13,000 (IRC § 2102). (See IRS Publication 448, *Federal Estate and Gift Taxes*, for more information.)

**Estate Tax Return.** If the decedent was neither a resident nor a citizen at death, file Form 706NA, *United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States*, if the value of the gross estate located in the U.S. exceeds \$60,000. The gross estate may be reduced in the same manner as for a citizen of the U.S. The return is due 9 months after the date of death unless an extension is granted. File the return with the Internal Revenue Service Center, Philadelphia, PA 19255. (See the instructions for Form 706NA for more information.)

## GIFT TAX

**General.** The federal gift tax applies to the gratuitous transfer of property. The person making the gift (the donor) must generally pay the tax. If the donor does not pay the tax, the person receiving the gift (the donee) may have to pay it. Whether a person is subject to the gift tax may depend on whether the person is a U.S. citizen or resident. For an individual who is neither a citizen nor a resident of the U.S., the federal gift tax applies only to gifts of property in the U.S.

**Gifts to Noncitizen Spouses.** Like the marital deduction for estate tax purposes, there is a marital deduction for gift tax purposes (IRC § 2523). Most gifts to citizen spouses are free from gift tax. For gifts to a noncitizen spouse made after July 14, 1988, however, there is no gift tax marital deduction (IRC § 2523(i)). Instead, the annual \$10,000 per donee exclusion is increased to \$100,000 (IRC § 2523(i)(2)). In addition, IRC § 2523(i)(3) applies to lifetime transfers between spouses certain repealed provisions concerning the tax consequences of joint ownership between spouses. For example, this means that a transfer of real property owned by the spouses as tenants by the entirety to the noncitizen spouse alone will be a gift to the noncitizen spouse. The value of the gift for gift tax purposes will be based on the proportion of the value that the noncitizen-donee spouse receives in excess of the donee spouse's contribution to the purchase price. Thus, only annual lifetime gifts to non-citizen spouses less than \$100,000 now avoid the federal gift tax.

For gifts made after June 29, 1989, the \$100,000 annual exclusion for gift transfers to a noncitizen spouse is allowed only for transfers that would qualify for the marital deduction if the donee were a U.S. citizen. Thus, a gift in trust would not qualify for the annual exclusion unless it satisfies one of the exceptions to the terminable interest rule. The \$100,000 annual exclusion for gifts to a noncitizen spouse is available regardless of whether the donor is a citizen, resident alien, or a nonresident alien. On the other hand, a gift to a citizen spouse will qualify for a gift tax marital deduction regardless of the citizenship of the donor spouse.

Example (from IRS Publication 448): Don, a U.S. citizen, is married to Maria, a resident alien. In 1990, Don transfers to Maria 100 shares of X Corporation stock valued for federal gift tax purposes at \$130,000. The transfer is a gift of a present interest and is a deductible interest for gift tax purposes. Accordingly, \$100,000 of the \$130,000 gift is not included in the total amount of gifts made by Don during the calendar year for federal gift tax purposes. Don must report \$30,000 on his annual gift tax return, Form 709, as a taxable gift.



## **CHAPTER 3**

### **BASIC WILL PROVISIONS**

#### **INTRODUCTION AND DIRECTIONS FOR USE**

The form provisions included in this chapter were selected because they will, in various combinations, meet the needs of many military personnel. The legal assistance attorney using this chapter to formulate a client's will must be mindful of the hazards inherent in form provisions. No form provision can be expected to fulfill every need. Although the provisions included here will meet some needs, their primary purpose is to stimulate the drafter's thought processes and serve as a first step in the decision concerning just what is needed in a particular client's will. The final step must always be a careful evaluation of the suitability of each word chosen in light of that client's expressed desires and needs.

The attorney using this chapter must also keep in mind that the form provisions in this chapter are out of context. For example, the use in a will of a simple phrase such as "If my wife does not survive me, then to my children in equal shares" is subject to different interpretations unless the terms "survive" and "children" are defined in the same document. Again, only a word by word analysis of what each provision does--and does not do--will allow the drafter to produce a correct instrument.

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## **I. INTRODUCTORY CLAUSE**

I, \_\_\_\_\_, legally domiciled and resident in \_\_\_\_\_, now (in the active) (retired from the) military service of the United States, (and temporarily residing in \_\_\_\_\_), being of sound and disposing mind and not acting under any duress, fraud, or undue influence of any person, publish and declare this instrument as my LAST WILL AND TESTAMENT.

## **II. REVOCATORY CLAUSE**

I hereby revoke all prior wills and codicils made by me.

## **III. PAYMENT OF DEBTS AND TAXES**

I direct that all of my personal debts be paid from my estate prior to distribution if the Executor(rix) so desires, otherwise such debts will be apportioned to each devisee and legatee according to his or her share.<sup>1</sup>

Unless specifically provided otherwise, debts secured by any property shall not be required to be exonerated, but shall pass with the property.

OR

Debts secured by any property may be paid prior to property distribution or passed with the property as my Executor(rix) in his (her) discretion may decide.

Taxes, excepting inheritance taxes levied on the devisees and legatees, shall be paid from the residuary portion of my estate.<sup>2</sup>

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<sup>1</sup>Because every jurisdiction requires a testator's debts to be paid as a matter of law, no mention of debts need be made at all except in the situation where a creditor is also a legatee. A debt clause in the creditor-legatee situation is used to avoid confusion over whether the bequest is intended as payment of a debt. If a debt clause is used in any other situation, it should be carefully tailored to meet specific needs.

<sup>2</sup>A clause directing the payment of taxes is unnecessary unless, as in this provision, it is included to insure tax payment comes from a specific part of the estate so other bequests, e.g., a marital deduction bequest, will not be reduced by a pro rata tax payment. In the absence of a tax payment clause, state law varies as to which parts of the estate will be used to pay taxes.

#### IV. SPECIFIC DISPOSITION OF PROPERTY

A. Specific bequest of item of personal property.

I give and bequeath to \_\_\_\_\_, if he/she shall survive me, (e.g., my gold watch).

B. Specific bequest of item of personal property with contingent and alternative disposition provisions.

I give and bequeath to \_\_\_\_\_, if he/she shall survive me, (e.g., my gold watch). If he/she shall not survive me, then I give and bequeath said (my gold watch) to \_\_\_\_\_, if he/she shall survive me. If he/she shall not survive me, such property shall be added to and disposed of pursuant to the provisions of Item \_\_\_\_\_ (usually the residuary provision) herein.

C. Pecuniary legacy provision.

I give and bequeath to \_\_\_\_\_, if he/she shall survive me, the sum of \_\_\_\_\_.

D. Pecuniary legacy provision with contingent and alternative disposition provisions.

I give and bequeath to \_\_\_\_\_, if he/she shall survive me, the sum of \_\_\_\_\_. If he/she shall not survive me, then I give and bequeath said sum to \_\_\_\_\_, if he/she shall survive me. If he/she shall not survive me, such property shall be added to and disposed of pursuant to the provisions of Item \_\_\_\_\_ (usually the residuary provision) herein.

E. Provision for specific bequest of stock.

I give and bequeath to \_\_\_\_\_, if he/she shall survive me, \_\_\_\_\_ of the stock of \_\_\_\_\_ or of any successor or resulting corporation of such corporation which I own at the time of my death.<sup>3</sup>

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<sup>3</sup>This is constructed to avoid interpreting the provision as a demonstrative legacy (i.e., "I bequeath 500 shares of Y Corporation"). If the testator divested himself of the stock prior to his death, under a demonstrative legacy provision, the executor would be obligated to distribute to the beneficiary property of equivalent value. If the provision noted here is used, the bequest would be adeemed and inoperative.

F. Specific devise of interest in family home to surviving spouse.

I give and devise to (my wife), if she shall survive me, any interest which I own at the time of my death in the house and lot located at (address), or if I have no interest in said house and lot at the time of my death, any interest I own at the time of my death in the house and lot which I occupy as my residence at the time of my death.<sup>4</sup>

G. General anatomical gift clause.

Desiring that my body or any part thereof be made available upon my death for transplant or for storage until it can be used for transplanting, I give and donate my body to (name), (address).<sup>5</sup>

H. Clause for multiple specific bequests.

I hereby give, devise and bequeath all of my estate, including all property of which I may die seized and possessed, or to which I may be entitled at the time of my decease, of whatsoever kind and nature, be it real, personal or mixed, wherever it may be situated, as follows:

a.

b.

## V. DEFINITIONS

The term "children" as used in this will includes children hereafter born to or adopted by me, [and any minor stepchildren living with me at the time of my death]<sup>6</sup> as well as the children I now have.

The term "minor" as used in this will means a person under [twenty-one (21)] years of age.

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<sup>4</sup>A specific devise of the family home to the surviving spouse is only necessary when the spouse is not receiving a fee interest in the entire estate by general devise and bequest. If used, the alternative provision shown here is recommended because of the transitory nature of military life.

<sup>5</sup>Since the will may not be read prior to disposition of the body, instructions of this nature should be given to a family member. See Paragraph P for a more detailed anatomical gift provision.

<sup>6</sup>Any provision a testator(rix) desires to make for stepchildren must be expressly stated. Few, if any, states define children to include stepchildren as a matter of law.

The term "descendants" as used in this will means the immediate and remote lawful, lineal descendants by blood or adoption of the person referred to who are in being at the time they must be ascertained in order to give effect to the reference to them.

The term "issue" as used in this will means all persons who are descended from the person referred to, either by legitimate birth to or legal adoption by that person, or any of that descendant's legitimately born or legally adopted descendants.

The term "per stirpes" as used in this will means the property shall be distributed in equal shares among my living children and the descendants of my deceased children. Descendants of deceased children shall take by right of representation.

## **VI. GENERAL DISPOSITION OF PROPERTY**

I give, devise and bequeath all of my estate and property of which I may be seized or possessed or to which I may be entitled at the time of my death, wherever situated or of whatever nature, be it real, personal or mixed, including lapsed legacies and any property over which I may have a power of appointment<sup>7</sup> to (my wife, . . .)(my brother, . . .) as her (his) sole and absolute property if she shall survive me.

## **VII. RESIDUARY AND CONTINGENT BENEFICIARY CLAUSES**

### **A. General residuary clause for children.**

In the event that (spouse) or (primary beneficiary) shall not survive me, I give, devise and bequeath all of the said rest, residue and remainder of my estate and property absolutely and forever, share and share alike, to (my children) or (contingent beneficiary) and any child or children that may be born to me (us) or adopted by me (us) hereafter who shall survive me; but if any of my (our) children or adopted children shall not survive me, then to the descendants of such child or children who may be living at my death, such descendants to take per stirpes and not per capita; in the event that any of my (our) children or adopted children shall not survive me and also shall not be survived by descendants, then the share of any such child or children shall be divided among my (our) surviving children and adopted children and the surviving descendants of any of my (our) children who have not survived me, such descendants to take per stirpes and not per capita.] If neither my (spouse) or (primary beneficiary) [nor any child, adopted child or descendant of mine ] shall survive me, then I give, devise and bequeath all of the said rest, residue and remainder of my

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<sup>7</sup>The attorney should examine any known power of appointment and determine whether it should be exercised or not. Instruments creating powers of appointment frequently state that the power can only be exercised by specific reference to the creating instrument.

estate and property, absolutely and forever, (in equal shares), to \_\_\_\_\_ (contingent beneficiary) \_\_\_\_\_ or such of them as shall survive me).

[Language in brackets applies only to married testator with children.]

B. General residuary clause for nonspecific beneficiaries.

In the event that \_\_\_\_\_ predeceases me or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath unto \_\_\_\_\_ all of my estate, be it real, mixed or personal property, wherever situated, to be \_\_\_\_\_ absolute property.

C. General residuary clause for children with alternate disposition to both sets of parents if children have predeceased testator.

In the event that \_\_\_\_\_ predeceases me or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath all of my estate, be it real, mixed or personal property, wherever situated, unto \_\_\_\_\_ and any other surviving child or children of this marriage, natural or adopted, to be their absolute property, in equal shares, share and share alike. However, should neither the said \_\_\_\_\_ nor any of my children survive me, then I give, devise and bequeath one-half (1/2) of the rest, residue and remainder of my estate, unto \_\_\_\_\_ or the survivor of them, if none, unto their descendants; and one-half (1/2) thereof unto \_\_\_\_\_ or the survivor of them, if none, unto their descendants, to be their absolute property.

D. General residuary clause for children (names not specified, equal shares, no provision for heirs and assigns).

In the event that the said \_\_\_\_\_ predeceases me or that our death occurs simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath unto any surviving child or children of this marriage, natural or adopted, all of my estate, be it real, mixed or personal property, wherever situated, to be their absolute property, in equal shares, share and share alike.

- E. General residuary clause for children (names not specified, provision for heirs and assigns).

In the event that \_\_\_\_\_ predeceases me, or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath unto any child or children of this marriage, natural or adopted, their heirs and assigns, to be their absolute property, per stirpes and not per capita, all of my estate, be it real, mixed or personal property, wherever situated.

- F. General residuary clause for children (names not specified, equal shares, provision for specified alternate contingent beneficiaries).

In the event that \_\_\_\_\_ predeceases me or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath unto any surviving child or children of this marriage, natural or adopted, all of my estate, be it real, mixed or personal property, wherever situated, to be their absolute property, in equal shares, share and share alike. However, should neither \_\_\_\_\_ nor \_\_\_\_\_ survive me, then my entire estate, and all the rest, residue and remainder thereof, I give, devise and bequeath unto \_\_\_\_\_ in equal shares.

## VIII. APPOINTMENT OF EXECUTOR

I hereby appoint<sup>8</sup> \_\_\_\_\_  
of \_\_\_\_\_  
as Executor(rix) of this my LAST WILL AND TESTAMENT, (and I request that he (she) be permitted to serve without bond or surety thereon and without the intervention of any court or courts, except as required by law).<sup>9</sup> In addition to any powers and discretions granted my Executor(rix) by law, I hereby authorize and empower my said Executor(rix), in his (her) absolute discretion, to sell, exchange, convey, transfer, assign, mortgage, pledge, lease, or rent the whole or any part of my real or personal estate, to invest, reinvest, or retain investments of my said estate, to perform all acts and to execute all documents which my said Executor(rix) may deem necessary, convenient or proper in regard to my property.

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<sup>8</sup>Some states do not permit the appointment of a non-resident executor.

<sup>9</sup>Provision provides for appointment of executor without bond. Some states, e.g., Texas, allow executors to be appointed as independent executors.

In the event that my Executor(rix) shall predecease me or shall for any reason refuse or be unable to serve or to continue serving as Executor(rix) hereof, then I hereby appoint \_\_\_\_\_ of \_\_\_\_\_ as Executor(rix) in his (her) stead, to serve without (with) bond or (and) surety and with the same powers and authority.<sup>10</sup>

If it becomes necessary to have ancillary administration of my estate in any jurisdiction where the Executor is unable or does not desire to qualify as ancillary legal representative, I appoint as such ancillary legal representative such individual or corporation as my Executor shall designate, in writing. I direct that any balance of my property remaining after such ancillary administration be delivered, to the extent permitted by law, to my Executor for disposition in accordance with the terms of this Will. I direct that all of the powers or privileges and immunities granted to my Executor hereunder shall also apply to any such legal representative.<sup>11</sup>

I further direct that such ancillary legal representative shall not be required to give any bond or other security for the faithful performance of his or its duties, or if any bond is required, neither he nor it shall be required to give any surety thereon.<sup>12</sup>

## **IX. APPOINTMENT OF GUARDIAN**

### **A. General Guardianship Provision.**

In the event that I shall die leaving a minor child or children surviving me (and my said wife (husband) shall not survive me), I hereby appoint<sup>13</sup> \_\_\_\_\_ of \_\_\_\_\_ as testamentary guardian of the person (and property) (and trustee of the property)<sup>14</sup> of each minor child of mine who shall survive me, during his or her minority. The guardian (trustee) to serve without bond or surety and without the intervention of any court or courts, except as required by law.

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<sup>10</sup>Provision provides for an alternate executor without bond. If a natural person is nominated as primary executor, at least one alternate should be named.

<sup>11</sup>Provision gives executor the authority to appoint an ancillary executor for property in a state requiring a resident executor. Ancillary administration is often necessary for military families because of real property owned in states other than the state of domicile.

<sup>12</sup>Provision waives bond requirement for ancillary executor.

<sup>13</sup>Some states do not permit appointment of a non-resident guardian.

<sup>14</sup>The same person does not have to be named guardian of both the person and the property of a minor -- though a combined guardian is the norm. In many states, flexibility and economy can be improved by naming a person trustee of a minor's property instead of guardian. See also provision XI, infra, for a method which allows the guardian of the child's person to be custodian of the child's property under the Uniform Gifts to Minors Act.

If \_\_\_\_\_ dies, resigns, or is otherwise unable to act, then I appoint \_\_\_\_\_ as testamentary guardian of the person and property of such minor child or children and direct that he shall also serve without bond.<sup>15</sup>

B. Guardianship provisions for children of prior marriages.

1. Guardian only.

In the event that my former (husband/wife), \_\_\_\_\_, predeceases me or dies under circumstances specified elsewhere in this will, or is unable or unwilling to care for my (children/son/daughter, (names):

I hereby nominate, constitute and appoint \_\_\_\_\_ guardian(s) over the persons and the property of my children of my former marriage to the said \_\_\_\_\_ until such time as the children reach the age of majority. The guardianship shall expire for each child when he or she reaches the age of majority, without the necessity of waiting until all the children reach the age of majority.

I direct that the said \_\_\_\_\_ shall not be required to give any bond or other surety in connection with qualifying or acting in this capacity.

2. Guardian and alternate guardian.

In the event that my former (husband/wife), \_\_\_\_\_, predeceased me, or is unable or unwilling to care for my children, son/daughter (names) \_\_\_\_\_, I hereby nominate, constitute and appoint \_\_\_\_\_ guardian and \_\_\_\_\_ alternate guardian over the person(s) and property of the said (name of child/children), until such time as \_\_\_\_\_ reach(es) the age of majority. I direct that the said \_\_\_\_\_ and \_\_\_\_\_ shall not be required to give any bond or other surety in connection with qualifying or acting in this capacity.

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<sup>15</sup>Provision provides for appointment of an alternate guardian. At least one alternate should always be named.



## **X. SURVIVORSHIP AND SIMULTANEOUS DEATH CLAUSES**

- A. Wherever in this my LAST WILL AND TESTAMENT it is provided that any person shall benefit hereunder if such person shall survive me, that person shall be deemed not to have survived me if he or she shall die (within thirty (30) days after my death).<sup>16</sup>
- B. In the event that any beneficiary under this my LAST WILL AND TESTAMENT and I shall die at the same time, or under such circumstances that it is difficult or impossible to determine which of us died first, such beneficiary shall be deemed to have predeceased me.<sup>17</sup>
- C. If my (wife) and I die under such circumstances that it is difficult or impossible to determine who died first, it shall be presumed that my (wife) survived me.<sup>18</sup>

## **XI. BEQUEST TO MINOR UNDER UGMA OR UTMA**

If any beneficiary to this Will is a minor, I direct that his or her share be given to his or her guardian as custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of the state (or the state of (name)) to be managed, held, and distributed in accordance with the provisions of said Act.<sup>19</sup>

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<sup>16</sup>Survival may be conditioned on any period up to 180 days without adverse legal consequences. The time periods most frequently used are 30, 60, or 90 days.

<sup>17</sup>Provision establishes a presumption that testator(rix) survives spouse and other beneficiaries or legatees. This clause is used to prevent double probate of assets due to multiple deaths resulting from a common disaster. The phrase "or die in a common disaster with me", which is found in many formbook simultaneous death clauses, is not recommended for use in military wills because a few states have held the phrase to create an indefinite survival requirement. In those states that have adopted the Uniform Simultaneous Death Act, provisions creating the presumption of the testator's survival are unnecessary. Remember the presumption created by this clause will only be given effect if the actual order of death cannot be factually determined.

<sup>18</sup>Provision establishes a presumption that wife survived testator. This clause is used when a greater tax advantage can be achieved by taking the marital deduction than by avoiding double probate in cases of simultaneous death.

<sup>19</sup>Provision gives property of minor to guardian of minor's person to hold as custodian under UGMA or UTMA. The custodianship is more flexible and less expensive than most statutory guardianships. CAVEAT: Some states (currently, Michigan and Vermont) do not allow for the

## **XII. POUR OVER PROVISION**

(If my spouse does not survive me,) I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description, wherever situated and whether acquired before or after the execution of this Will, to \_\_\_\_\_ as Trustee under that certain Trust Agreement between myself as Settlor and \_\_\_\_\_ as Trustee executed prior to the execution of this Will on \_\_\_\_\_. The Trustee shall add the property bequeathed and devised by this Item to the corpus of the above described Trust and shall hold, administer and distribute said property in accordance with the provisions of the said trust Agreement, including any amendments thereto made before my death.<sup>20</sup>

[In the event for any reason the bequest and devise under Item \_\_\_\_\_ is ineffective and invalid then I hereby give, devise and bequeath the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situated and whether acquired before or after the execution of this Will, to my Trustee hereinafter named to be held, administered and distributed as hereinafter provided.]<sup>21</sup>

## **XIII. MILITARY SURVIVOR'S BENEFITS PROVISION**

I have served in the Armed Forces of the United States. Therefore, I direct my Executor or Executrix to consult the legal assistance attorney at the nearest military installation to ascertain if there are any benefits to which my dependents are entitled by virtue of my military affiliation at the time of my death. Regardless of my military status at the time of my death, I direct my Executor or Executrix to consult with the nearest Department of Veterans Affairs and Social Security Administration office to ascertain if there are any benefits to which my dependents may be entitled.<sup>22</sup>

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creation of custodianships by will. See Appendix G (and Annex B of Appendix G) for a detailed discussion of custodianships.

<sup>20</sup>Provision gives the residue of the estate to an inter vivos trust created during the testator's lifetime, to be administered in accordance with the terms of the trust. The most frequent use of this clause for military families is to pour-over the residuary estate into a contingent unfunded life insurance trust for minor children. Some state laws regarding pour-over provisions are quite restrictive. See note 25, *infra*, and accompanying text.

<sup>21</sup>The drafter can protect against the possibility that a pour over provision to an inter vivos trust may be declared invalid under state law by including in the will a testamentary trust which "mirrors" the inter vivos trust. The provision shown is a lead-in clause for a "mirror" testamentary trust.

<sup>22</sup>Provision alerts executor(rix) to the possible existence of military survivor benefits.

#### **XIV. RIGHT OF REVOCATION FOR RECIPROCAL/MUTUAL WILLS**

Although my wife/husband, and I are making wills with similar provisions, each of us does so only because we are presently of one mind concerning disposition of our estate; our Wills are not contractual, reciprocal, or dependent upon one another; and I explicitly retain the right to change or revoke my Will at any time, either before or after the death of my wife/husband.

#### **XV. CLAUSE FOR INTENTIONAL OMISSION OF POTENTIAL CLAIMANTS<sup>23</sup>**

Except as otherwise provided in this, my LAST WILL AND TESTAMENT, I have intentionally omitted to provide herein for any other relatives or for any other person, whether claiming to be an heir of mine or not.

#### **XVI. ANATOMICAL GIFT<sup>24</sup>**

Realizing that after my death my body or parts of my body may be of value for medical research, education, therapy, transplantation, or otherwise; I hereby make the anatomical gift, if medically acceptable, to take effect upon my death. My body or any needed organs or parts of my body should be made available immediately after my death to a physician or a group of physicians, a hospital, a medical school, an organ bank or storage facility, or other medical institution for medical research, medical education, therapy, transplantation, and/or other medical uses authorized by law. PROVIDED, HOWEVER, my executor shall have authority to nullify or limit this gift as he in his discretion shall see fit. However, I have decided to make such gift after careful consideration and hope my executor and family will feel morally bound to follow its mandate. I recognize that this appears to place a heavy responsibility upon my executor; but it is with the intention of relieving others of such responsibility and of placing it upon myself in accordance with my strong convictions, that this gift has been made.

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<sup>23</sup>Care should be exercised in using this clause when the testator desires to omit a spouse or natural or adopted child from the will. Any children should be specifically excluded by name. In community property states, a spouse may generally be excluded from sharing in the testator's specific estate, but not the community estate. In common law jurisdictions, a spouse generally may not be disinherited.

<sup>24</sup>See Appendix C for an Anatomical Gift form to use outside the will.

## **XVII. LIVING WILL (ADVANCE MEDICAL DIRECTIVE)<sup>25</sup>**

Death is as much a reality as birth, growth, maturity and old age--it is the one certainty of life. If the time comes when I, \_\_\_\_\_, can no longer take part in decisions for my own future, let this statement stand as an expression of my wishes, while I am still of sound mind. If the situation should arise in which there is no reasonable expectation of my recovery from physical or mental disability, I request that I be allowed to die and not be kept alive by artificial means or "heroic measures." I do not fear death itself as much as the indignities of deterioration, dependence, and hopeless pain. I, therefore, ask that medication be mercifully administered to me to alleviate suffering even though this may hasten the moment of death. This request is made after careful consideration. I hope you who care for me will feel morally bound to follow its mandate. I recognize that this appears to place a heavy responsibility upon you, but it is with the intention of relieving you of such responsibility and of placing it upon myself in accordance with my strong convictions, that this statement is made.

## **XVIII. SIGNATURE**

IN WITNESS WHEREOF I have hereunto set my hand and seal in the presence of the witnesses whose names appear hereafter, published the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

\_\_\_\_\_  
(Testator(rix))

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<sup>25</sup>State laws vary on whether a terminal illness or injury is required before giving effect to a living will. State laws also vary as to whether and when a living will can direct withholding of nutrition and hydration. Additionally, many states provide statutorily for living wills as separate documents. There appears to be no prohibition against including such language in a testamentary document. However, the same considerations apply as for anatomical gifts - make sure relatives are aware of these provisions.

## **XIX. ATTESTATION CLAUSE**

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ testator, personally Published and Declared the foregoing instrument, as and for his Last Will and Testament, in the presence of each of us and all of us together, who, at his request, in his presence, and in the presence of each other, also signed the said instrument as witnesses. We further state that each of us believes that at the time he executed the foregoing instrument he was of sound mind and memory, of lawful age, and did so execute it as his own free act and deed and not under the unlawful influence of any person.

\_\_\_\_\_ SSAN: \_\_\_\_\_

PERMANENT ADDRESS \_\_\_\_\_

\_\_\_\_\_ SSAN: \_\_\_\_\_

PERMANENT ADDRESS \_\_\_\_\_

\_\_\_\_\_ SSAN: \_\_\_\_\_

PERMANENT ADDRESS \_\_\_\_\_

## **XX. SELF-PROVING PROVISION**

For the statutory provision of a particular state, see the specific state in Chapter 4 of this text. For those states which do not have a specific statutory format, the following provision can be used:

THE STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

We, \_\_\_\_\_, and \_\_\_\_\_, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

\_\_\_\_\_  
Testator

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

Subscribed, sworn and acknowledged before me by \_\_\_\_\_ the testator, subscribed and sworn before me by \_\_\_\_\_, and \_\_\_\_\_ witnesses, this \_\_\_\_\_ day of \_\_\_\_\_ A.D., \_\_\_\_\_.

(SEAL)

(SIGNED) \_\_\_\_\_

\_\_\_\_\_  
(OFFICIAL CAPACITY OF OFFICER)

## XXI. TESTAMENTARY TRUST PROVISIONS

- A. Contingent Trust for Children. (Separate trust for each child; termination at a specified age).

Notwithstanding the preceding provisions of this Will, if any part of my estate shall, upon partial or final termination of my estate, be distributable to any beneficiary who has not reached the age of [twenty-one (21) years] then such portion shall be retained by my [trustee] as a separate trust for the benefit of any such beneficiary, and distributed upon the following terms and in accordance with the powers and duties herein set out. In the event my Trustee should fail or cease to serve as Trustee for any reason, then said portion shall be retained by my [alternate trustee \_\_\_\_\_], upon the same terms and conditions and with the same powers and duties given my Trustee.

1. I direct that my Trustee serve independent of court supervision, and that no bond or other security be required.
2. The Trustee shall have all of the powers and duties as provided by the laws of the state in which this Will is probated, and also the following powers for each separate trust herein created: to accumulate all or part of the income of such trust, or to distribute so much of the income and principal of such trust to or for the benefit of the beneficiary as the Trustee, in his sole judgment and discretion, deems necessary for the maintenance, support, health and education (including primary, secondary and college) of the beneficiary, taking into consideration the person's age, any income the person may have from other sources to the knowledge of the Trustee, and any other factors deemed relevant by the Trustee. It is my intention that the beneficiary be enabled, insofar as possible, to maintain the standard of living to which he or she is accustomed. The Trustee shall make all distributions directly to the beneficiary's guardian of the person, or, if the beneficiary has attained the age of majority as determined by the law of the state in which this Will is probated, directly to the beneficiary. Upon making a distribution to the beneficiary's guardian of the person, the Trustee may specify the purpose of such payment and may require an accounting from the said guardian of the person, but the receipt of said payment by the guardian of the person shall constitute a full discharge to the Trustee for all monies so paid.
3. Each separate trust herein created shall terminate when the beneficiary attains the age of \_\_\_\_\_ and the remaining principal and undistributed income of such trust shall be distributed by the Trustee to the beneficiary, in fee simple. Before making any such distribution, the Trustee shall have the right to require any release from a beneficiary that the Trustee deems it necessary to secure.
4. If any beneficiary above named should die before attaining the age of \_\_\_\_\_, then all of the assets remaining in such deceased beneficiary's trust share shall pass to the surviving beneficiary, or equally to the surviving beneficiaries under this will. If the surviving beneficiary or beneficiaries are then under the age of \_\_\_\_\_, such share shall not be distributed to the said surviving beneficiary or beneficiaries outright, but shall be added to the said beneficiary's or beneficiaries' trust share(s) as an integral part thereof, to be administered and distributed in accordance with all of the terms and conditions applying thereto. If all of the beneficiaries of a trust created under this will provision should die before the youngest beneficiary has attained the age of \_\_\_\_\_, then all of the assets remaining in any and all of the trusts herein created shall be distributed, free of trust, to \_\_\_\_\_.

5. No part of the income or principal of any trust estate shall ever be anticipated, transferred, or assigned by any beneficiary or distributee, or subjected to any judicial process against any beneficiary or distributee before the same has been paid. No part of the interest of any beneficiary or distributee shall in any event be subject to sale, hypothecation, assignment, or transfer, nor shall any part of such principal or income be seized, attached, or in any manner be subject to judicial proceedings against any beneficiary or distributee on account of the debts, assignments, sale, divorce, or other obligations of any beneficiary or distributee.
6. For the Trustee's services rendered in administering each trust herein created, he shall be entitled to receive a fair and reasonable fee, which shall be in lieu of all statutory fees, but in no case shall said fee exceed the customary and prevailing fee charged by corporate fiduciaries in the county where the trust is being administered for the rendering of a similar service at the time.
7. Notwithstanding anything in this Will to the contrary, no trust herein created shall continue beyond twenty-one (21) years after the death of the last to die of those beneficiaries, contingent or otherwise, who were living or conceived at the time of my death. Any trusts still in effect at the expiration of such maximum period shall then terminate and the trust assets shall be distributed, outright, to the person for whom such trust was continued.

B. Contingent Trust for Children. (Combined trust, prior distributions accountable against beneficiaries' share, termination at specified age as to each beneficiary).

In the event that the said \_\_\_\_\_ predeceases me or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath all of my estate to my trustee, \_\_\_\_\_, to be held in trust for \_\_\_\_\_ and for any other child or children of my marriage to \_\_\_\_\_, natural or adopted, or the survivors thereof. The income and corpus of the trust is to be used for the care, maintenance, support and education of the beneficiary(ies) and the trustee shall have full discretion to distribute the income and corpus in whatsoever proportions and amounts \_\_\_\_\_ deem fit. Each distribution shall be charged against each beneficiary's account in computing said beneficiary's share of the corpus and of subsequent income of the trust, except that distributions for medical expenses shall not be so charged. The trustee shall have complete discretion in allocating principal and income, investing, managing, leasing, improving, encumbering, pledging, selling, and liquidating assets under the standard of a reasonable man, including investing in stocks. The trustee shall not be required to serve with any bond. If any beneficiary dies before reaching age \_\_\_\_\_, the entire trust shall not



terminate because of such death, but the surviving beneficiary(ies) shall become the sole beneficiary(ies). The trust shall terminate as to each beneficiary when he or she reaches age \_\_\_\_\_ without the necessity of waiting until all the beneficiaries reach age \_\_\_\_\_. As soon as thereafter practicable, the trustee shall distribute to said beneficiary his or her proportionate share of the trust property, free and clear of trust.

- C. Contingent Trust for Children. (Combined trust, prior distributions not accountable against beneficiaries' share, termination when youngest child reaches specified age).

#### ARTICLE \_\_\_\_\_ RESIDUARY

All the rest, residue and remainder of my property and estate, real and personal, of whatever nature and wherever situated, including any property hereinbefore mentioned but not effectually disposed of, I give to my husband/wife, if he/she survives me. If he/she does not survive me, I give such property to my issue surviving me, by right of representation.

Notwithstanding the foregoing, if my husband/wife does not survive me and any child of mine is under the age of \_\_\_\_\_ years at the time of my death, all such property shall be distributed to my trustee hereinafter named, to be held, administered and distributed as hereinafter provided in the Article of this will entitled Trust for Children.

#### ARTICLE \_\_\_\_\_ TRUST FOR CHILDREN.

The purpose of this trust is to provide for the support, maintenance, medical expenses, education (including a secondary school, four years of college or equivalent preparation in business, technical or trade training, and post-graduate college education) and general welfare of my surviving children and to provide for the distribution of my property as stated in the following paragraphs.

Such of the income and corpus as is needed (even to the exhaustion of the trust) shall be applied or distributed by my trustee, in cash or in kind, for the comfortable support and education of each beneficiary. Said distribution shall be made to those persons and in such manner and amounts as my trustee, in its unrestricted discretion, believes will fulfill the purposes of the trust. My trustee is authorized to make such distributions directly to said beneficiary, to his guardian or to any other person in behalf of such beneficiary without the trustee being liable to see to the application thereof. Amounts so distributed shall not be taken into account in making the division of the trust as provided below. It is my expectation and intention that if guardians of the person are appointed for a minor child, my trustee will exercise the foregoing power to protect the guardians, to the extent possible, from suffering any significant financial burden by reason of their appointment.

When there is no living child of mine under the age of \_\_\_\_\_ years, my trustee shall distribute the remaining trust assets to my then living issue by right to representation, or failing such issue, as provided in Article \_\_\_\_\_ below.

If the beneficiary of this trust dies before the principal of this trust is fully distributed, my trustee may in its discretion pay from the trust assets expenses of last illness, funeral, and related expenses of the beneficiary.

The interest of any beneficiary hereunder shall not be subject to assignment, alienation, pledge, attachment, or claims of creditors of such beneficiary. If the interest of any beneficiary should, because of any debt incurred by, or other claim against, such beneficiary or any seizure under any legal, equitable or other process, become payable or likely to become payable to any person other than such beneficiary, my trustee shall withhold payment to such beneficiary until such assignment, transfer, encumbrance, anticipation, or other disposition, writ or legal process is cancelled or withdrawn in such manner as shall be satisfactory to my trustee; and until such time my trustee may use and pay all or part of the income and principal as my trustee may deem advisable directly for the support and maintenance of the beneficiary.

Notwithstanding any other provision of this will, if the assets of this trust are reduced to a sum which, in my trustee's discretion, would not be economical to continue in trust, then my trustee may pay over the trust assets to my then living issue by right of representation, provided that if a distributee is a minor, his share shall be paid to, and held, administered and distributed by, trustee as custodian for said minor under the Uniform Gifts to Minors Act of either the State in which the beneficiary or custodian resides, or any other State of competent jurisdiction, as that Act exists at the time of my death and, for this purpose, that Act is incorporated by reference.

If the proceeds of any policy of life insurance or pension or profit sharing plan are paid to my trustee pursuant to the terms of such policy or plan, I direct my trustee to add such proceeds to the principal of the trust hereby created and to hold, administer and dispose of such proceeds as part of said principal.

D.     Alternative Distribution of Contingent Trust Property. (Trust principal distributed in increments at specified ages.)

When the eldest of my living children reaches the age of (22), my trustee shall divide the property of the trust into equal shares:

1.     One share for each of my children who is then living, and
2.     One share for the then living descendants, collectively, of each deceased child of mine. My trustee is instructed to then distribute the shares of the descendants of my deceased children to them per stirpes.

My trustee shall hold and administer in trust each share set aside for a child of mine as follows:

When each child of mine reaches the age of (22) years, the trustee shall distribute to the child one-third of the share set aside and administered for him. When the child reaches age (28) years, my trustee shall distribute to the child one-half of the remaining principal and accumulated interest of the share set aside for him. When the child reaches the age of (35) years my trustee shall distribute to him the remaining principal and interest in the share set aside for him.

- E. Family Trust With Income "Sprinkled" Among Wife and Children. (Trust for life of children).

ARTICLE \_\_\_\_\_. RESIDUARY.

I dispose of all the rest, residue, and remainder of my property and estate, real and personal, of whatever nature and wherever situated, including any property hereinbefore mentioned but not effectually disposed of (but excluding any property over which I may have a power of appointment, it being my intention not to exercise any such power), as follows:

1. If my wife/husband, \_\_\_\_\_, survives me, I give and devise my residuary estate to my trustees IN TRUST, to invest and reinvest and at any time or from time to time to pay out of the net income such amount or amounts (whether equal or unequal, and whether the whole or a lesser amount) as my trustees (other than any beneficiary) may in their sole discretion determine to such one or more of my wife and my descendants as my trustees (other than any beneficiary) may in their sole discretion select. In exercising this discretionary power, my trustees may but will not be required to consider the needs and desires of my wife/husband and at any time or from time to time to pay out of the net income such amount or amounts (whether equal or unequal, and whether the whole or a lesser amount) as my trustees (other than any beneficiary) may in their sole discretion determine to such one or more of my wife and my descendants as my trustees (other than any beneficiary) may in their sole discretion select. In exercising this discretionary power, my trustees may but will not be required to consider the needs and desires of my wife/husband. Any net income not paid out shall be added to the trust principal.
2. Upon my wife/husband's death, if issue of mine survive her/him, my trustees shall divide and set apart all property then belonging to the principal of the trust into as many equal shares as will allow them to set apart one such share for each child of mine who shall survive my wife/husband and one such share for each deceased child of mine who is survived by then living issue.
3. Each share so set apart for a child of mine shall be held by my trustees IN TRUST, to invest and reinvest and to pay the net income to such child

during his or her life at least quarter-annually, and at any time or from time to time to pay to such child so much of the principal, whether the whole or a lesser amount, as my trustees may in their sole discretion determine. In exercising this discretionary power, my trustees may but need not consider any other resources of the child. Upon the death of the child my trustees shall distribute all property then belonging to the principal of the trust, together with all income then on hand or accrued, to such person or persons (other than the child, the child's estate, the child's creditors or the creditors of the child's estate), and in such estates, interests and proportions, as the child may, by a will specifically referring to this Article of this will, appoint. If the child shall fail to exercise, or shall not fully and effectually exercise, such power of appointment my trustees shall distribute all property not effectually appointed to the issue of the child him or her surviving, per stirpes, or, in default thereof, to my issue then living, per stirpes, or in default thereof, to (charity); provided that any property which would pass to a child of mine who is then entitled to the net income from another trust then held under this Article shall not pass to such child but instead shall be added to the principal of such other trust.

4. Each share so set apart for the issue of a deceased child of mine shall be distributed to such issue, per stirpes.

(Additional language may be added to direct holding such shares in trust for minors and to provide for distribution of income as it accrues or at a set age (i.e., 21)).

F. Contingent Trust for Children. (Short form).

SIXTH. In the event that the said \_\_\_\_\_ predeceases me or that our deaths occur simultaneously or approximately so, or in the same disaster or calamity, or under circumstances causing doubt as to which of us survived the other, or in the event that \_\_\_\_\_ does not survive me by thirty days, I hereby give, devise and bequeath all of my estate to my trustee, \_\_\_\_\_, to be held in trust for \_\_\_\_\_. The income and corpus of the trust is to be used for the care, maintenance, support and education of the beneficiary and the trustee shall have full discretion to distribute the income and corpus in whatsoever amounts and at whatsoever times as \_\_\_\_\_ deems fit. The trustee shall have complete discretion in allocating principal and income, investing, managing, leasing, improving, encumbering, pledging, selling, and liquidating assets under the standard of a reasonable man, including investing in stocks. The trustee shall not be required to serve with any bond. The trust shall terminate when said beneficiary reaches age \_\_\_\_\_. As soon as thereafter practicable, the trustee shall distribute to said beneficiary the trust property, free and clear of trust.



## **CHAPTER 4**

### **COMPENDIUM OF STATE STATUTES**

**All legal assistance offices should have an up to date copy of the Martindale-Hubbell Law Digests. That is the primary resource for individual state research on substantive law. The following state by state guide contains those states that have particular military provisions in the wills and estates area. There is also a more complete substantive law breakdown for American Samoa and Guam because Martindale-Hubbell does not have those territories in its digest.**

## **ALASKA**

**STATUTE:** Alaska Stat. § 13.11.005 et seq. (1985).

**MILITARY PROVISIONS:** A mariner at sea or soldier in military service may dispose of his personal property by means of oral will, provided will reduced to writing within 30 days of declaration or submitted for proof to the court within six months after the testamentary words are spoken. Must be written and next of kin notified before admitted to probate. § 13.11.158.

## **AMERICAN SAMOA**

**STATUTE:** Am Samoa Code Ann. § 40.0101 et seq. (1981 & Supp. 1988).

**INTESTATE DESCENT & DISTRIBUTION:** The intestate succession scheme of American Samoa is not unlike that of many American states. Personal property not disposed of by will passes to the children of a decedent subject to the dower interest of any surviving spouse and payment of debts. § 40.0201. If there are no children, the surviving spouse inherits the entire estate of an American Samoan decedent. Real property passes under American Samoan intestate law to the decedent's issue, subject to the dower rights of any surviving spouse. If there are no linear descendants, real property passes to brothers and sisters, and if none are surviving, to the father of the decedent. § 40.0202.

### **BASIC WILL REQUIREMENTS:**

- (1) Age - 18. § 40.0401.
- (2) Testamentary Capacity - any person of "full age" and sound mind may dispose of property by will, § 40.0101.
- (3) Formalities - wills disposing of property exceeding \$300.00 must be in writing and signed by the testator. § 40.0102. At least two witnesses must attest to the testator's signature. § 40.0102.

**RESTRICTION OF ALIENATION OF LAND:** Devise of realty to individuals who are not full blooded Samoa is restricted. § 37.0204 and § 40.0101.

**INTERESTED WITNESS:** no provision.

**NUNCUPATIVE (ORAL) WILL:** Valid only for wills involving personal property of \$300 or less, § 40.0101.

MILITARY PROVISIONS: None.

FIDUCIARY BOND REQUIREMENTS:

Executor - Bond required in an amount set forth by the High Court, § 40.0310. Executors or administrators are allowed a commission not to exceed two and one-half percent upon receipts and two and one-half upon disbursements, with a minimum of \$40. §40.0333.

Guardian - Same as for executors. § 40.0404.

FIDUCIARY RESIDENCY REQUIREMENTS:

Executor - American Samoan law provides that a personal representative must be at least 21 years old and be a resident of American Samoa, §40.0306. If no person is named in the will, the statutory priority specified under law is to surviving spouse (or someone designated by the surviving spouse), next of kin in order of degree of relationship, and last, to a competent creditor residing in American Samoa. , § 40.0305.

Guardian - must be at least 21 years old and be a resident of American Samoa, § 40.0403.

SPOUSE'S RIGHT OF ELECTION: a statutory right of dower of one-third of a decedent spouse's real or personal property, see Burns Philip Co., v. APO. Fiame, Falealfi, 2 Am. Samoa 2d 39 (1985). A surviving spouse may elect, within 90 days of admission of the will to probate, to take a dower interest instead of property bequeathed or devised in the will, § 40.0105. Samoan law provides, however, that dower rights do not apply to communal property "held under the Samoan custom," § 40.0106.

SELF-PROVING PROVISION: No. The normal formalities for executing wills should be followed for the wills of American Samoa domiciliaries, using the self-proving affidavit of the place of execution with appropriate modifications. If the will is to be executed abroad, attorneys should consider using the attestation, acknowledgment, and self-proving affidavit provided by the Uniform Probate Code (see next page).

SMALL ESTATES: Collection of money by affidavit for estates of \$1000 or less is authorized § 40-0342. Administration without a personal representation is possible, upon court order, for estates less than \$10,000 in value. § 40.0334.

Reference: TJAGSA Practice Notes, Legal Assistance Items, Will Drafting for American Samoa Domiciliaries, The Army Lawyer, May 1991, at 44.



The following self-proving affidavit is contained in the Uniform Probate Code, 8 Unif. L. Ann. § 2-504 (1995):

State of \_\_\_\_\_

County of \_\_\_\_\_

We \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly [or willingly directed another to sign for him], and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as his witnesses and that to the best of his knowledge the testator was at the time eighteen years of age or older, of sound mind and under no constraint or undue influence.

\_\_\_\_\_  
Testator

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

Subscribed, sworn to and acknowledged before me by \_\_\_\_\_, the testator, and subscribed and sworn to before me by \_\_\_\_\_, and \_\_\_\_\_, witnesses, this \_\_\_\_\_ day of \_\_\_\_\_.

(Signed) \_\_\_\_\_

\_\_\_\_\_  
(official capacity)

### CALIFORNIA

STATUTE: Cal. Probate Code § 1 et seq. (West 1991 & Supp. 1995).

CALIFORNIA STATUTORY WILL: §§ 6200-6243 et seq. California has enacted legislation which recognizes the validity of statutory wills. These are commercially available.

## DISTRICT OF COLUMBIA

STATUTE: D.C. Code Ann. § 18-101 et seq.

MILITARY PROVISIONS: A person in actual military service may dispose of property orally if his or her oral disposition is proved by at least two witnesses present at the request of testator. Additionally, the will must be made during the time of decedent's last illness and reduced to writing within 10 days after it was made. § 18-107.

## GEORGIA

STATUTE: O.C.G.A. Title 53, §§ 53-1-1 et seq. (1982 & Supp. 1994).

MILITARY PROVISIONS: When a subscribing witness is unavailable due to military service, death or incapacity, the will may be admitted to probate upon testimony of two disinterested witnesses that testator's signature is authentic. § 53-3-18 (**only effective until 1 Jan 98**). See § 53-9-40 et seq. for the appointment of a conservator for the management and disposition of an MIA's property, together with the full conservatorship provisions. See § 10-635 with regard to powers of attorney. In essence, power is not revoked until grantee has actual notice of grantor's death.

## GUAM

STATUTE: Guam Code Annotated, Title 15 - Estates and Probate (1995).

INTESTATE DESCENT & DISTRIBUTION: Upon the death of either husband or wife, the community property is divided one-half to the surviving spouse and the other half is subject to the testamentary disposition of decedent, and in absence thereof, to the surviving spouse. § 1001. The surviving spouse shall divide the separate property equally with any children of the decedent, § 903. If the decedent leaves a surviving spouse, but no issue, the decedent's separate estate goes one-half to such surviving spouse and one-half to the decedent's parents in equal shares, or brothers and sisters, § 907.

### BASIC WILL PROVISIONS:

- (1) Age - 18. § 101.
- (2) Testamentary Capacity - sound mind. § 101.

(3) Signature - every will must be in writing and every will, other than a holographic will must be executed and attested with the testator's signature or it must be subscribed under the testator's direction, in his presence. The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will. § 201.

(4) Witnesses - there must be at least 2 attesting witnesses who sign the will, at the end of the will, at the testator's request and in the testator's presence. The witnesses should give their place of residence but failure to do so will not invalidate the will. § 201.

INTERESTED WITNESS: All beneficial devises, bequests and legacies to a subscribing witness are void unless there are two other disinterested witnesses to the will, except that, if any such interested witness would be entitled to any share of the estate of the testator in case the will were not established, such interested witness shall take such proportion which does not exceed the intestate share, § 203.

NUNCUPATIVE (ORAL) WILL: Prohibited. § 201.

HOLOGRAPHIC WILL: Valid if written, dated and signed by the hand of the testator. Witnesses are not required. No other formalities are required for execution. § 207.

MILITARY PROVISIONS: None.

FIDUCIARY BOND REQUIREMENTS:

Executor - Bond required unless will provides otherwise, § 2011.

Guardian - Bond not required of a testamentary guardian unless court orders it. § 4006.

FIDUCIARY RESIDENCY REQUIREMENTS:

Executor - Must be a natural person or an authorized territorial bank, must not be under the age of majority, must be a resident of Guam, must not have been convicted of a felony (Superior Court can waive this), and must not have been adjudged incompetent. Chapter 17, §§ 1701-1725.

Guardian - Either parent of a legitimate child, living or likely to be born, may appoint a guardian of the person and estate or person or estate, of such child, by will or by deed, to take effect upon the death of the parent appointing, with the written consent of the other parent or if the other parent is dead or incapable of consent. If the child is illegitimate, such appointment may be made by the mother. § 3504. No statutory provisions for residency requirement of a guardian.

REVOCATION: A testator who has made a testamentary disposition of property subsequently executes an instrument which alters his interest in such property, such instrument operates as a revocation of such testamentary disposition if the subsequent instrument expresses the testator's

intent that it should be a revocation or the subsequent instrument contains a provision wholly inconsistent with the terms of the initial testamentary disposition unless such inconsistent provision depends on a condition or contingency by reason of which such inconsistent provisions do not take effect. Additionally, a will is revoked by physical destruction with the intent to revoke. § 407. If a testator marries after making a will, and the spouse of that marriage survives the testator, the will is revoked as to such spouse, unless other intentions are evident. § 401. If a testator marries after making a will and has issue of such marriage, and any of the issue survive the testator, or is born after the death of the testator, the will is revoked as to such issue, unless other intentions are evident. § 405.

EFFECT OF SUBSEQUENT DIVORCE: has the effect of revoking provision as to the former spouse, unless the will shows a specific intent to the contrary and no other evidence to rebut the presumption of revocation can be received. § 403.

UNIFORM GIFTS TO MINORS ACT: If a testator provides in his will that a bequest shall be paid or delivered to a custodian subject to Guam Uniform Gifts to Minors Act is applicable. The testator may bequeath securities, money, life or endowment policies and annuity contracts to a minor, pursuant to Guam Uniform Gifts to Minors Act §§ 727-745.

UNIFORM SIMULTANEOUS DEATH ACT: Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if such person had survived §1301.

CHOICE OF LAWS: The interpretation of wills, wherever made, is governed, when relating to property within the Territory of Guam, by the laws of the Territory of Guam, unless an intention to the contrary clearly appears in the will. § 601.

Note: Title 15 of the Guam Code Annotated was enacted by the Legislature to replace the former Probate Code of Guam (1976). The effective date of this Title is March 16, 1982. The basis of the substantive changes is California law as of the date of drafting (1980). Procedural changes have been made to suit the conditions on Guam. The legislature did not follow the new Model Probate Code.

## INDIANA

STATUTE: Ind. Stat. Ann. § 29-1-1 et seq. (Burns, 1989 Replacement Volume)(1994 Cumm. Supp.).

BASIC WILL REQUIREMENT: Age - 18 or younger if a member of Armed Forces. § 29-1-5-1.

NUNCUPATIVE (ORAL) WILL: A person may dispose of personal property up to \$1,000 (or \$10,000 if in the active military in time of war) in value by oral will, provided that he or she is in imminent peril or fear of death and dies as a result of impending peril. Additionally, two disinterested witnesses are required, one of which must reduce will to writing within 30 days of declaration. An oral will does not revoke an existing written will but only changes it to the extent necessary to give effect to the oral provisions. § 29-1-5-4.

## KANSAS

STATUTE: Kan. Stat. Ann. § 59-101 et seq. (1995).

NUNCUPATIVE (ORAL) WILL: A testator in his last sickness may dispose of his personal property by oral will if witnessed by two disinterested persons and reduced to writing 30 days after declaration. § 59-608.

## LOUISIANA

STATUTE: Donations Mortis Causa, Forced Heirship and Disposable Portion. La. Civ. Code Ann. art. 1470 et seq., art. 1493 et seq. (West).

MILITARY PROVISIONS: Wills of persons employed in armed forces in the field may be received by a commissioned officer in the presence of two witnesses. Such wills are subject to no other formalities other than being reduced to writing and signed by testator. Art. 1597, Civ. Code.

## MARYLAND

STATUTE: Estates and Trusts, Annotated Code of Maryland.

MILITARY PROVISIONS: A will entirely in the handwriting of testator who is serving in the armed forces is a valid will, even if there are no attesting witnesses, if signed by testator outside territorial limits of the United States. Will is void 1 year after discharge from service unless testator has died prior to expiration date of the year or loses testamentary capacity during said period. § 4-103.

## MASSACHUSETTS

STATUTE: Mass. Gen. Laws Ann. ch. 190, § 1 et seq. (West 1990 and Supp. 1993)

MILITARY PROVISIONS: A soldier in actual military service or mariner at sea may dispose of personal property by oral will. Ch. 191, § 6.

## MISSISSIPPI

STATUTE: Miss. Code Ann. § 91-1-1 - § 91-19-19. (1972 and Supp. 1992)

MILITARY PROVISIONS: Military wills may be oral or written. "Any person of sound mind 18 years of age or older and being in the armed forces on the United States of America, in active service at home or abroad ..., may devise, dispose of, and bequeath his goods, chattels or property, real and personal, *anything in this chapter to the contrary notwithstanding.*" § 91-5-21 (emphasis added). The chapter referred to is chapter 91-5 (Wills).

## MISSOURI

STATUTE: Mo. Ann. Stat. § 472.010 et seq. (Vernon 1992 & Supp. 1995).

NUNCUPATIVE (ORAL) WILL: A person in imminent peril of death may dispose of personal property up to \$500 provided that testator dies as a result of imminent peril. Further requirements include two disinterested witnesses, reduction to writing within 30 days of declaration by witness or person under his or her direction, and submission to probate within six months after death. A nuncupative will does not revoke or change a valid written will. § 474.340.

## NEVADA

STATUTE: Title 12, Nev. Rev. Stat. Ann. § 133.010 et seq. (Michie 1993 & Supp. 1993).

NUNCUPATIVE (ORAL) WILL: A testator may dispose of personal property up to \$1,000 by oral will, provided that the will is made during last illness and witnessed by two persons. § 133.100. Reduced to writing within 30 days and proved within six months of the oral communication.

## NEW HAMPSHIRE

STATUTE: N.H. Rev. Stat. Ann. § 551:1 et seq.

NUNCUPATIVE (ORAL) WILL: In order to be valid where the personal estate bequeathed exceeds one hundred dollars in value it must have been declared in the presence of three (3) witnesses at the testator's request in his last sickness and in his usual dwelling, except when he was taken sick from home and died before his return, nor unless a memorandum thereof was reduced to writing within six days, and presented for probate within six months from the making thereof. 551 § 15, 16. Valid without witnesses if estate \$100 or less.

MILITARY PROVISIONS: (Yes - Nuncupative will) An active duty service member may dispose of his/her movables and personal estate as he "might heretofore have done." See § 551:15.

## NEW JERSEY

**STATUTE:** N.J. Stat. Ann. § 3B:3-1 et seq. (West 1983 & Supp. 1994).

**MILITARY PROVISIONS:** None for making a will. When a resident of NJ dies while a member of the armed forces of the United States or within 2 years of discharge and no witness to his will is available in NJ to prove the will, either because of death, incapacity, nonresidence, absence, or for any other reason, the will shall be admitted to probate upon proff of the signature of the testator by any two persons, provided the will was validly executed as provided in N.J.S. 3B:3-9. N.J.S. 3B:3-20.

When the only living subscribing witness or witnesses, to the will of the resident of NJ, is not or are not available in NJ to prove the will, because of absence from NJ while in the armed forces of the United States or of any ally of the United States, or while in the merchant marine, in time of war or national emergency, the will shall be admitted to probate upon proof of the signature of the witnesses to the will, provided the will would have been admitted to probate if the witnesses were dead. N.J.S. 3B:3-21.

## NEW YORK

**STATUTE:** N.Y. Estates, Powers & Trusts Law § 1-1.1 et seq. (cite as EPTL) and Surrogates Court Procedure Act (SCPA) (McKinney).

**MILITARY PROVISIONS:** A testator may dispose of property by oral will, provided he is (1) a member of the armed forces while in actual military or naval service during declared or undeclared war or other armed conflict in which members of the armed forces are engaged; (2) or is a person serving with or accompanying armed forces in these circumstances; or (3) is a mariner at sea. A will executed during armed conflict or while at sea expires after 1 and 3 years respectively. A handwritten will is valid if the testator is a member of the Armed Forces or a mariner. EPTL 3-2.2.



## **NORTH CAROLINA**

**STATUTE:** N.C. General Statute § 31-1 et seq. (Wills); 29-1 et seq. (Intestate Succession); § 33-1 et seq. (Guardian and Ward); § 30-1 et seq. (Surviving Spouse) § 28A-1 et seq. (Administration of Decedents' Estates); § 31A-1 et seq. (Acts Barring Property Rights)

**MILITARY PROVISIONS:** A will executed by a person while in the armed forces or merchant marine shall be admitted to probate even in absence of subscribing witnesses, provided three witnesses testify that the signature is that of testator. The will shall be effective to devise real property and bequeath personal property. § 31-18.4.

## **OHIO**

**STATUTE:** Ohio Rev. Code Ann. § 2105 et seq. (Anderson 1994 & Supp. 1994).

**NUNCUPATIVE (ORAL) WILL:** Valid as to personalty only if made during the testator's last sickness and reduced to writing by two witnesses within 10 days after the speaking of the testamentary words. It must be offered for probate within six months after testator's death. § 2107.60. Oral will is void if beneficiary named is a witness.

## **OKLAHOMA**

**STATUTE:** Okla. Stat. Ann., Tit. 84, Sec. 213 (West).

**MILITARY PROVISIONS:** A testator in actual military service who is in actual contemplation, fear or peril of death may dispose of property not exceeding in value the sum of \$1,000 by oral will, provided that will is witnessed by two persons who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect. Tit. 84, Sec. 46.

## **RHODE ISLAND**

**STATUTE:** R.I. Gen Laws § 33-1-1 et seq. (Michie 1984 & Supp. 1994).

**MILITARY PROVISIONS:** Any soldier, airman or seaman in actual military service may dispose of his personal estate by will as he might have at common law. § 33-5-6.

## **TENNESSEE**

**STATUTE:** Tenn. Code Ann. § 30-1-101 et seq.

**MILITARY PROVISIONS:** Members of the armed forces in time of war may dispose of up to \$10,000 of personalty by oral will. An oral will may be made by a person in imminent peril of death, whether from illness or otherwise, and shall be valid only if the testator dies as a result of the impending peril, and must be 1) declared to be testator's last will and testament before two disinterested parties, 2) reduced to writing by one of or at the direction of one of the witnesses within (30) thirty days of the declaration, and 3) submitted for probate within 6 months after the death of the testator. A noncupative will neither revokes nor changes an existing written will. § 32-1-106.

## **TEXAS**

**STATUTE:** Tex. Prob. Code Ann. § 1 et seq. (West 1980 & Supp. 1995).

### **BASIC WILL REQUIREMENTS:**

- (1) Age - 18, or under 18 if married or in the Armed Forces. § 57.

**NUNCUPATIVE (ORAL) WILL:** Valid if made in the time of the last sickness, at home or where testator has resided for at least 10 days, except when the testator is taken sick away from home and dies before he returns, and must be proved by three witnesses when the value of the estate exceeds \$30.00. § 65.

## VERMONT

STATUTE: Vt. Stat. Ann. tit. 14, § 1 et seq.

MILITARY PROVISIONS: A soldier in actual military service, or a seaman or mariner at sea, may dispose of his/her wages or other personal property as he might have otherwise done. 14 VSA §§ 6-7. Note: the four cases reported in the annotation to this statute are all from the Civil War era. Under common law a will was established upon the testimony of one witness only. See Gould v. Safford's, 39 Vt. 498 (1866).

## VIRGIN ISLANDS

STATUTE: V.I. Code Ann. tit. 15, ch. 1 et seq. (1964 & Supp. 1994).

MILITARY PROVISIONS: A soldier or sailor while in actual military or naval service can execute a nuncupative or holographic will in the following manner:

- (1) Nuncupative Will - valid if made before two witnesses.
- (2) Holographic Will - valid if wholly written by the testator.  
Such will shall become invalid 1 year after the soldier or sailor leaves military service provided he possesses testamentary capacity at that time. § 8. If he lacks testamentary capacity after one year from the date of discharge, it shall continue to be valid until expiration of one year from the time he regains testamentary capacity.

## VIRGINIA

STATUTE: Va. Code Ann. § 64.1 et seq.

MILITARY PROVISIONS: A soldier in actual military service or a seaman at sea may dispose of his personal property by an oral will. § 64.1-53.

## WASHINGTON

STATUTE: Wash. Rev. Code Ann. § 11.02.005 et seq.

MILITARY PROVISIONS: Any member of the armed forces or merchant marines may dispose of wages or personal property by oral will. See § 11.12.025. Substance must be committed to writing; presented to probate within six months and heirs and widow notified of rights to contest.

## WEST VIRGINIA

STATUTE: W. Va. Code § 41-1-1 et seq. (Michie 1982 and Supp. 1994).

MILITARY PROVISIONS: Notwithstanding the two preceding sections (§§ 41-1-3, 41-1-4), a soldier being in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as "he might heretofore have done" [Editor's note: see discussion of this language in New Hampshire section]; and the will of a person domiciled out of this State at the time of his death shall be valid as to his personal property in this State, if it be executed according to the law of the state or country in which he was so domiciled. § 41-1-5.



**APPENDIX A**  
**WILL DRAFTING CHECKLIST**

**I. DATA ACCUMULATION.**

**A. Personal.**

1. Names, aliases, former names, social security numbers (SSN's).
2. Dates of birth (DOB).
3. Prior divorces - date, final, verified.
4. Residence.
5. Domicile.
6. Citizenship/immigration status of the parties.
7. Children: Names, DOB's, SSN's
  - a. Of this marriage.
  - b. Prior marriages.
  - c. Others expected.
8. Any antenuptial contract?
9. Any property declarations or transmutation agreements?
10. Any prior marital termination contract?
  - a. This marriage.
  - b. Prior marriages.
11. Occupations of parties and children.
12. Work histories.
13. Education levels.
14. Special needs/handicaps.
15. Community property?

**B. Insurance policies.**

1. Name of insurer.
2. Policy number.
3. Policy owner.
4. Type.
5. Face value.
6. Transferable?
7. Beneficiary? SGLI & Death Gratuity "By Law" designations--is there a need to revise them?

C. Assets.

1. Stocks, bonds, and notes.
  - a. Certificates? Street name?
  - b. Location of certificate/instrument.
  - c. Security perfected.
  - d. Valuation; date and method used.
  - e. Income tax basis.
  - f. Form of title.
2. Tangible personal property.
  - a. Automobile(s).
    - (1) Make, model, and year.
    - (2) Fair market value and method of valuation.
    - (3) Outstanding loan balance and monthly payment.
    - (4) Form of ownership.
  - b. Collectibles, furnishings, and appliances that client believes are significant.
    - (1) Describe.
    - (2) Value and method of valuation.
    - (3) Outstanding loan balances and monthly payments.
  - c. Miscellaneous items.
    - (1) Describe.
    - (2) Value and method of valuation.
    - (3) Outstanding loan balances and monthly payments.
3. Intangibles.
  - a. Financial accounts.
    - (1) Type.
    - (2) Account number.
    - (3) Owner.
    - (4) Institution (name, address).
    - (5) Value.
  - b. Partnership Interests/Shelters.
    - (1) Income tax basis and date of acquisition.
    - (2) Expectancies and Nonvested Assets.
      - (a) Nature.
      - (b) Date contingency to be fulfilled.
      - (c) Controlled by whom?
4. Realty.
  - a. Present occupant.
  - b. Popular description.
  - c. Legal description.
  - d. Title in whose name? Form?
  - e. Encumbrance?
    - (1) Who is creditor?
    - (2) Type of security?
    - (3) Who is debtor?
    - (4) Perfected?
    - (5) Amount due? Payment rate?
    - (6) Any balloon?
    - (7) Interest rate? Flexible?
    - (8) Any unrecorded claims - i.e., amount owed to family?
    - (9) Valuation - method used.
  - f. If leased, length of lease - rental received/obligations of owner.
  - g. Basis for income tax purposes (depreciation, gain previously deferred).

- D. Debts and Claims.
  - 1. General creditors.
    - a. Who are the creditors?
    - b. Type of debt (unsecured loan, revolving charge account, mortgage, etc.)
    - c. Reason for incurring the debt.
    - d. Encumbered property.
    - e. Who is obligated to pay?
  - 2. Estate Taxes.
    - a. Federal.
    - b. State.
  - 3. Death and Funeral Expenses.

## II. FORMALITIES.

- A. Testamentary capacity.
  - 1. Age.
  - 2. Competent.
  - 3. U.S. citizen.
- B. Revoke prior wills.
  - 1. Codicil.
  - 2. New will.
- C. Type of will.
  - 1. Holographic.
  - 2. Oral.
  - 3. Formal.
- D. Advice to testator.
  - 1. Liquidity problems.
  - 2. Probate avoidance vehicles.
  - 3. Coordinate beneficiary forms on life insurance.
  - 4. Ways to increase value of estate.

## III. DRAFTING THE AGREEMENT.

- A. Preamble.
  - 1. Identify testator (trix).
  - 2. Declare domicile.
  - 3. Military status.
  - 4. Revoke prior wills.
  - 5. Recitals (optional).
    - a. Spouse.
    - b. Children.
- B. Funeral/Burial Desires.
  - 1. Left in separate memorandum?
  - 2. Anatomical gifts.
  - 3. Living will.
- C. Specific bequests.
  - 1. Carefully described.
  - 2. Ademption problems?
  - 3. Insurance proceeds pass with property.
  - 4. Property subject to encumbrance.
  - 5. Real estate.
    - a. Ancillary probate.
    - b. Encumbered?
    - c. Freedom to distribute.



6. Demonstrative bequests.
  - a. Ademption problems.
  - b. True intent of testator ascertained?
7. General bequests.
8. Conditional bequests.
  - a. Condition clearly spelled out.
  - b. Time for performance clear.
  - c. Not expressed as a mere wish.
9. Charitable bequests.
  - a. Organization qualifies as charity
  - b. Organization described carefully.
10. Will testator leave a personal property letter?
  - a. Binding letter.
  - b. Incorporate a list by reference?
  - c. Referred to in will.
- D. Residuary Bequests.
  1. Primary beneficiary(ies).
  2. Alternate beneficiary(ies).
  3. Catchall beneficiary.
  4. Property to minors.
    - a. Alternatives to guardianship (custodian account/trust).
    - b. Per stirpes/per capita?
    - c. Benefit afterborn?
- E. Testamentary Trusts.
  1. Type of trust.
    - a. Unitary.
    - b. Single trust.
  2. Purpose of trust.
  3. Name of trustee.
    - a. Specify alternate.
    - b. Powers.
    - c. Bond.
    - d. Compensation.
  4. Distribution.
    - a. Income.
    - b. Principal.
    - c. Age of distribution.
  5. Rule Against Perpetuities.
  6. Spendthrift trust clause.
  7. Bailout clause.
- F. Appointment of Fiduciaries.
  1. Primary and alternates named.
  2. Bond waived.
  3. Corporate or individual.
  4. Single individual, not co-fiduciary.
  5. Ancillary probate required.
  6. Residence of fiduciary.
  7. Compensation.
  8. Powers.
    - a. Enumerated powers.
    - b. Incorporate state statutory powers.

- G. Administrative Clauses.
  - 1. Survivorship clause.
    - a. Simultaneous death.
    - b. Survivorship period less than 6 months.
    - c. Specified in terms of hours.
  - 2. Debts/apportionment clause.
    - a. Does will unnecessarily require testator to pay "all just debts"?
    - b. Clause give power to extend or renew?
    - c. Tax apportionment.
      - (1) Apportioned among all beneficiaries.
      - (2) Paid for out of residuary.
    - d. Abatement problems considered?
  - 3. No contest (interrum) clauses.
  - 4. Disinheritance of relative.
    - a. Omit reasons for disinheriting.
  - 5. Severability Clause.
  - 6. Veteran's benefits clause.
- H. Definitions.
  - 1. Per stirpes (or per capita).
  - 2. Children.
    - a. Stepchildren.
    - b. Adopted.
    - c. After-born.
  - 3. Issue.
  - 4. Terms such as personal property and household goods.
- I. Attestation, Exordium, and Self-Proving.
  - 1. Contains signature for testator and witnesses.
  - 2. Place for date.
  - 3. Self-proving affidavit included for state of domicile.

#### IV. WILL EXECUTION.

- A. Supervised by attorney.
- B. Witnesses.
  - 1. At least 3 adults.
  - 2. Disinterested.
  - 3. Initial pages.
  - 4. Sign will and self-proving affidavit.
  - 5. Testator.
  - 6. Declare document is will.
  - 7. Sign will.
  - 8. Sign self-proving affidavit.
- C. Procedure.
  - 1. Follow SOP.
  - 2. Witnesses sign in front of each other and testator.
  - 3. Execute only one will.
  - 4. Don't remove staples.

#### V. TERMINATING RELATIONSHIP.

- A. Advice to client.
  - 1. Need to revise will.
  - 2. Where to keep will.
  - 3. How to revoke will.
- B. Terminate attorney-client relationship.



## APPENDIX B

### MORTUARY PLANNING SHEET

TO THE NEXT OF KIN OF: \_\_\_\_\_

This is an expression of my preferences and desires regarding the disposition of my remains and other arrangements at the time of my death. I am writing this to make things easier for you and to make my thoughts known.

I feel it would be best if preparation, casketing and transportation were handled by:

\_\_\_\_\_ Next of kin working with local funeral home.

\_\_\_\_\_ The military authorities, through their contact with a local funeral home  
(applicable only if on active duty).

\_\_\_\_\_ Next of kin working with: \_\_\_\_\_

\_\_\_\_\_  
(Name and address of funeral home)

At the time of death, I prefer:

\_\_\_\_\_ Conventional Burial.

\_\_\_\_\_ Cremation.

\_\_\_\_\_ No preference.

\_\_\_\_\_ I would like to be in

\_\_\_\_\_ Uniform:  
(Branch of Service)

My preference for a burial place or disposition of ashes is:

\_\_\_\_\_ Private Cemetery.  
(Show name and location)

\_\_\_\_\_ National or other Gov't  
Cemetery, contingent on  
availability of space.  
(Show name and address)

\_\_\_\_\_ Burial at sea.

\_\_\_\_\_ Wherever you decide it would be easiest for you.

\_\_\_\_\_ Other: \_\_\_\_\_

\_\_\_\_\_ In the event that my body should have to be shipped to another location, I prefer that the following funeral home be selected as "receiving" funeral home.

I desire the following religious services be conducted:

☐ Church services. (Show name and location of church) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
☐ Funeral home services.  
☐ Memorial services.  
☐ Graveside committal services.  
☐ Other, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(More than one block may be marked)

Military honors desired if available from \_\_\_\_\_ resources.  
(Service)

☐ \_\_\_\_\_ Chaplain \_\_\_\_\_  
(Service) (Please indicate religious preference)  
☐ Pallbearers. ☐ Bugler.  
☐ Firing Party. ☐ Color Guard.  
☐ Other, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

My preference concerning:

a. Government-furnished headstone or marker: \_\_\_ Yes \_\_\_ No

If preferred, type: \_\_\_\_\_

b. Clergy: \_\_\_\_\_

c. Flowers, memorials, agencies, contribution should be made to: favorite soloist or organist, psalms or other special requests:

\_\_\_\_\_  
\_\_\_\_\_

d. Friends to notify: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

OTHER DESIRES OR NOTES:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(SIGNATURE)

\_\_\_\_\_  
(DATE)

(A copy of this document should be given to your next of kin, executor and other close relatives).

## APPENDIX C

### ANATOMICAL GIFT BY A LIVING DONOR

I am at least 18 years of age and make this anatomical gift to take effect upon my death.  
The marks in the appropriate blanks and words filled into the blanks below indicate my desires.

1. I give: My body \_\_\_\_\_;  
Any needed organs or parts \_\_\_\_\_;  
The following organs or parts:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. To the following person:  
\_\_\_\_\_  
To any person, tissue bank, or institution authorized by law: \_\_\_\_\_;  
To the following named physician, hospital, tissue bank or other  
medical institution: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. For the following purposes:  
Any purpose authorized by law: \_\_\_\_\_;  
Transplantation: \_\_\_\_\_;  
Therapy: \_\_\_\_\_;  
Medical research and education \_\_\_\_\_.

Dated: \_\_\_\_\_ City and State \_\_\_\_\_

Signed by the Donor in  
the presence of the following  
who sign as witnesses:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Signature of Donor

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Address of Donor

\_\_\_\_\_

**This side not used.**

## APPENDIX D

### UNDERSTANDING YOUR POWER OF ATTORNEY

1. It is the policy of this office that you understand the meaning and effect of your power of attorney. The power of attorney is one of the strongest legal documents that an individual can give to another person. Accordingly, you must be making it of your own free will. It authorizes your agent (grantee) to act on your behalf and carry on your business in your absence. PLEASE NOTE that a person or business does not have to accept or acknowledge your power of attorney; it is totally within their discretion.
2. A GENERAL POWER OF ATTORNEY authorizes your agent to do any number of acts relating to your property and personal affairs. Because this document grants broad, virtually unlimited authority to your agent, it should be given to a person you trust completely.
3. A SPECIAL POWER OF ATTORNEY authorizes your agent to do one or more certain **specified** acts, such as selling your car, shipping household goods, or cashing a paycheck.
4. You should grant no greater power than is absolutely necessary. In addition, your agent (grantee) should be someone in whom you have absolute trust and confidence.
5. You will formally execute two copies of your power of attorney. You should give one copy to your agent and keep the second copy for yourself. Photocopies of your power of attorney are generally unacceptable because they do not contain original signatures or the notarial seal.
6. You should not make a power of attorney last any longer than is necessary. Local policy is that powers of attorney be limited to a maximum of three (3) years. Your power of attorney will automatically terminate upon the death of either you or your agent. Otherwise, it will terminate on the date that you specified in the document. Should you desire to revoke your power of attorney prior to its stated termination date, you should seek the assistance of the Legal Assistance Office or of a civilian attorney in order to do so.
7. If you have questions concerning your power of attorney, please contact your local Legal Assistance Office.

LEGAL ASSISTANCE OFFICE



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**APPENDIX E**  
**USES OF DURABLE POWERS OF ATTORNEY**

1. Management of property. The following powers should be considered and expressed in the document when appropriate:

- a. To make deposits and withdrawals from bank accounts, to sell, to lease, to borrow, to invest, etc.
- b. To have access to the principal's safe-deposit box.
- c. To sign tax returns on behalf of the principal and to represent or to obtain representation of the principal at a tax audit. [It is prudent to authorize an agent to execute the IRS's own power of attorney forms because it is not clear if the IRS will accept a durable power of attorney for the purposes described above. The IRS requires that powers of attorney relate to specific tax years. Therefore, an agent's authority to act in tax matters should be limited to a number of specific years, e.g., 1987-2002.]
- d. To deal with retirement plans (e.g., to make IRA contributions, rollovers, and voluntary contributions, to borrow from the plan, to elect pay-out options).
- e. To fund a previously created living trust or to create different forms of property ownership. [Both of these actions can be helpful in avoiding the necessity of ancillary administration with respect to real property owned in another state.]
- f. To borrow for the benefit of the principal, which may be desirable if the other alternative would be to sell a highly appreciated asset during the life of the principal, thus forfeiting the stepped-up basis at death.
- g. To deal with life insurance on the life of the principal, including such actions as increasing coverage. [This may even be possible without an additional physical exam], to use policy dividends for added insurance, and to borrow against the policy [thus giving the agent an alternative to selling assets and possibly incurring a capital gain tax.]
- h. To represent the principal in creating or modifying the terms of buy-sell agreements.
- i. To forgive or collect the principal's debts.
- j. To complete the principal's charitable pledges.
- k. To redirect the principal's mail.

- l. To cancel or continue the principal's credit cards and charge accounts.
  - m. To take custody of the principal's wills, deeds, life insurance policies, contracts, and securities.
  - n. To institute, settle, appeal, or dismiss administrative proceedings and litigation on the principal's behalf.
  - o. To reform estate planning documents [other than wills] if they prove to be defective after incompetency. [In this connection, some expression of intent in the durable power of attorney by the principal would be helpful. The lawyer must also be wary of changing "grand-fathered" estate planning documents if the effect would be to lose grand-fathering protection. Wills cannot be directly amended under a durable power of attorney.]
  - p. To nominate a conservator for the principal and a guardian for the principal's minor children.
  - q. To resign offices and positions, both public and private, on the principal's behalf.
2. Custody and management of the person.
- a. To establish a residence for the principal [e.g., a nursing home].
  - b. To arrange for the principal's transportation and travel.
  - c. To arrange for the principal's recreation.
  - d. To purchase, store, repair, and dispose of (including abandonment) the principal's clothing, consumables, household goods, furnishings, and personal effects.
  - e. To make advance funeral and burial arrangements and to arrange to give and to receive anatomical gifts on the principal's behalf.
  - f. To arrange for the care and/or disposition of the principal's pet animals.
  - g. To employ, compensate, and discharge domestics, companions, and other nonmedical personnel on the principal's behalf.
  - h. To arrange for the satisfaction of the principal's religious and spiritual needs.
  - i. To provide for the principal's companionship.
  - j. To nominate guardian's for the principal's minor children.

3. Health care decisions.

- a. To obtain and disclose the principal's medical records and other personal information.
- b. To employ and discharge health care personnel.
- c. To give or withhold consent to medical treatment of the principal.
- d. To give or withhold consent to psychiatric care of the principal.
- e. To authorize relief from the principal's pain.
- f. To grant releases to medical personnel and others on the principal's behalf.
- g. To refuse medical treatment on the principal's behalf.

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## **APPENDIX F**

### **EXECUTOR'S CHECKLIST**

#### **Stage 1--Preprobate Tasks**

1. Provide physician with accurate information for death certificate--request at least 6 copies from funeral director or state bureau of vital statistics.
2. Arrange for security at homes of decedent and close relatives.
3. Meet with decedent's family/heirs; offer assistance, information; obtain psychotherapeutic aid if needed.
4. Discuss and make decisions on donation of body organs with close family members.
5. Ascertain who has right to make funeral arrangements; render assistance (notify clergy if not already informed).
6. Obtain deed to cemetery plot.
7. Help family prepare obituary.
8. Provide care for minors/family members unable to care for themselves.
9. Provide immediate care/security for plants/pets/business and personal assets (especially perishables) and documents.
10. Determine cash needs of immediate survivors and adequacy and sources of cash to meet demands.
11. Tell all friends and family members to give you receipts for funeral-related expenditures.
12. Arrange for decedent's mail to be held at post office until your formal appointment; then arrange for forwarding. Stop newspapers and other deliveries if appropriate.
13. Notify bank--if named as executor or trustee--of death and request immediate appointment of administration officer.

#### **Stage 2--Obtaining "Letters"**

1. Locate and examine will.\* Advise spouse of right to obtain own attorney and elect against will.
2. Select and meet with attorney to represent estate.
3. Estimate decedent's assets/liabilities.
4. Prepare petition for "letters" (out-of-state property may require ancillary administration as well).
5. Probate will at Register of Wills office and order "short certificates."
6. If necessary, arrange for bond with surety. Ascertain if special procedure for small estates is available and/or if estate can be settled by family agreements.

#### **Stage 3--Assembling and Converting Assets**

1. Call property casualty insurance agent(s) and have all coverage checked for adequacy. Obtain confirmation in writing.

2. Call life insurance agent:
  - (a) Have health and life insurance on survivors reviewed;
  - (b) Request claim forms for proceeds on decedent's life (request IRS Form 712) and health/accident claims.
3. Contact bank for opening of safe-deposit box. Open new box for estate.
4. Redraft wills of survivors.
5. List all assets/liabilities. Examine checks, tax returns, insurance policies.
6. Locate and take control of all decedent's property.
7. Arrange for appraisal of personal property.
8. Arrange for appraisal of real estate.
9. Sell or dispose of all perishables.
10. Analyze and review securities. Put idle funds into money markets or CDs.
11. Notify Social Security/V.A. and county and begin to process forms for obtaining benefits.
12. Contact employer and request unpaid salary/bonus/ vacation pay/pensions/other death-related benefits.
13. Advertise grant of letters.
14. Notify local banks of decedent's death. Request information on accounts/safe-deposit box.
15. Transfer all cash to new checking account in estate's name. Set up accounting and control system and apply for employer identification number from IRS.
16. Obtain all stocks/bonds. Close brokerage accounts. Collect any interest/dividends. Sell securities to extent necessary/appropriate. Place balance in name of executor.
17. Inspect all real estate. Arrange for security, management/payment of taxes, collection of rents.
18. Put all jewelry/furs/art/other valuable personal effects into safe-deposit box or similar protected storage.
19. Proceed with, adjust and settle claims/lawsuits.
20. Check will/letter of instructions and consult decedent's heirs and attorney with respect to business continuation. Arrange for immediate supervision and management. Decide on sale/liquidation/continuance.

#### Stage 4--Filing and Payments of Taxes, Debts and Expenses

1. Request family exemption from state death tax if appropriate. Obtain exemption certificates for charitable gifts.
2. File state and federal income tax returns for (a) period before death and (b) period after death.
3. File federal estate tax return if necessary and pay tax due.
4. File state death tax return(s) (including other states) and pay tax due.
5. Pay personal or real property taxes due.
6. Pay bills, loans, etc.

7. Pay appraiser's, accountant's, lawyer's, personal representative's fees and court costs.

**Stage 5--Distribution**

1. Prepare and file accounting of receipts/disbursements/ schedule of distribution.
2. Notify unpaid creditors and beneficiaries of filing of account and time and date of audit.
3. Notify attorney general of state if charitable gifts are involved.
4. Establish testamentary trusts.
5. Transfer securities and other assets in accordance with court-approved distribution schedule (obtain receipt and release).
6. Petition for surety's discharge.



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## **APPENDIX G**

### **The Uniform Transfers to Minors Act:**

#### **A Practitioner's Guide**

Major Paul M. Peterson

Instructor, Administrative and Civil Law Division

The Judge Advocate General's School, U.S. Army

#### **Introduction**

Consider the following scenario: a military officer (Colonel Lee) is doing her own estate planning with her family (a husband and a young son) in mind. Colonel Lee decides to participate in Servicemen's Group Life Insurance (SGLI) at the maximum amount: \$200,000 in coverage. She lists her husband as primary beneficiary and her son, by name, as contingent beneficiary. Unfortunately, the Colonel and her husband are subsequently killed in a car accident. Her son is seventeen years old at the time of his parents' death. Because the Office of SGLI will not pay proceeds to a minor, court intervention is required to appoint a guardian of the property (or conservator) to receive the funds. Although one of the boy's aunts (Aunt A) is nominated in Colonel Lee's will as guardian, Aunt A is not a resident of Colonel Lee's domicile, and the court cannot legally appoint Aunt A as guardian. Eventually, after much expense and delay, the probate court appoints Aunt B, a proper resident, as the boy's guardian. By this time, the boy has applied to several colleges and he has been accepted at one of them. He is rapidly approaching the age of majority (eighteen), and Aunt B's attorney informs her that she will have to pay to the boy any unexpended monies in the guardianship when he reaches majority on his eighteenth birthday. He is a nice boy, but immature. She considers using a portion of the money for prepaid college tuition, but is advised that the state law in this area is unsettled. She then decides to ask for court approval of the tuition prepayment. Unfortunately, the boy turns eighteen while court proceedings are pending. The Aunt's attorney advises her that she must release the monies that she is holding and she reluctantly gives the boy a check for \$200,000. He then purchases a few things that he always wanted (like a fast car and a big boat), and he decides to postpone college for a year or so. . . .

This nightmarish scenario, and similar problems, could happen to the family of any soldier who does not carefully plan for property transfers for the benefit of his or her children. Estate planning vehicles exist that can mitigate or eliminate the potential for problems like those described above. One of these vehicles is the Uniform Transfer to Minors Act<sup>1</sup>/Uniform Gifts to Minors Act<sup>2</sup> (hereinafter UTMA/UGMA). The UTMA/UGMA presents a unique advantage to

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<sup>1</sup> UNIF. TRANSFERS TO MINORS ACT, 8B U.L.A. 497 (1983) [hereinafter UTMA].

<sup>2</sup> UNIF. GIFTS TO MINORS ACT, 8A U.L.A. 375 (1966) [hereinafter UGMA].

the military legal assistance attorney (LAA): relatively uniform application, independent of other state law, regardless of jurisdiction.<sup>3</sup> In contrast, the alternative forms of property transfers for minors (i.e., creation of a trust or use of a guardianship) are tied to specific state laws that vary from jurisdiction to jurisdiction. Given our diverse and mobile client base, LAAs may find it difficult or impossible to advise a particular client on the application of trust or guardianship laws to that particular client's situation. However, the same LAA can become knowledgeable in the provisions of the UTMA/UGMA custodianship, and render competent advice on the application of the custodianship to specific family situations and hypothetical future events.

### Purpose of Article

This article is a comprehensive guide to the custodianship created pursuant to the UTMA or its predecessor, the UGMA. This article describes the UTMA/UGMA, examines its provisions and the case law interpreting those provisions, and concludes with a general comparison of the UTMA/UGMA custodianship with alternatives (e.g., trusts and guardianships) in a testamentary transfer situation. The article also contains two appendices. Appendix A contains a discussion of the UTMA/UGMA as a vehicle for inter vivos gifts. Appendix B is a table that indicates, by state, those states that have adopted the UTMA and UGMA and how each state has varied the age of mandatory distribution.

After reading this article, the LAA should be able to advise any military client on whether an UTMA/UGMA custodianship is a reasonable method of testamentary transfers of property for the benefit of a minor. The LAA will be able to assist the client in establishing the custodianship through language in a will or life insurance designation. Most importantly, the LAA will be able to explain to the client exactly how a custodianship works and answer, with some confidence, any "what if" questions that the client might have.

### Purpose of Property Transfers to Minors

Why might someone wish to transfer property to a minor? For transfers contemplated during the transferor's lifetime (inter vivos transfers), the primary motivation usually is tax savings: possible savings to the transferor on income taxes, gift taxes, and estate taxes. For transfers contemplated on the donor's death (testamentary transfers), the primary motivation usually is to establish controls over money and property to be used for the benefit of the transferor's minor children. Although many LAAs may never advise a client on inter vivos transfers, LAAs will be involved in testamentary (e.g., life insurance and will preparation) planning.<sup>4</sup> Hence, this article focuses on the use of custodianships in testamentary planning

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<sup>3</sup> Every state has adopted some variation of the UTMA or UGMA (see Appendix B). The UTMA and UGMA were intentionally designed to operate independently of state laws governing trusts, guardianships, and other fiduciary relationships. See, e.g., UTMA, supra note 1, § 12(b). Because the UTMA and UGMA are uniform laws, they have the additional advantage that a state court interpretation in one jurisdiction will be persuasive authority as to the interpretation in other jurisdictions.

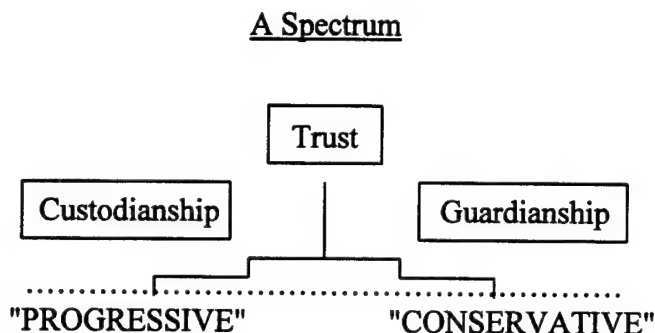
<sup>4</sup> DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6b (30 Sept. 1992). Legal assistance attorneys are required to counsel estate planning clients

situations: as repositories for life insurance proceeds or probate assets.

### Alternative Forms of Transfer to Minors

Generally, property can be transferred outright to the minor, or some fiduciary can be designated (as either a guardian, a trustee, or an UTMA/UGMA custodian) to hold and manage the property for the minor.<sup>5</sup> As a general matter, guardianships, trusts, and custodianships can be compared by placing them on a spectrum.

### Alternative Choices for Transfers to Minors:



On the conservative (right) side of the spectrum are arrangements established with the primary objective of ensuring that the minor's property is not abused or wasted: the fiduciary may be required to post a bond, may be limited in what he or she can do with regard to investments, and may be required to seek periodic court review and approval of the fiduciary's management decisions. On the other end of the spectrum are arrangements, established with the objective of ensuring that the costs of administration are minimized and that investment possibilities are maximized through reduction of court supervision, relaxation of investment restrictions, and elimination of bond requirements. On this spectrum, we can place the guardianship at the right, or "conservative," end: useful where the trustworthiness of the fiduciary may be an issue.<sup>6</sup> We

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about available SGLI elections. See Message, Headquarters, Dep't of Army, DAJA-LA, subject: Legal Assistance on Servicemen's Group Life Insurance Elections (100900Z Dec 92).

<sup>5</sup> For a detailed comparison of guardianships, trusts, and custodianships, see William M. McGovern, Jr., Trusts, Custodianships, and Durable Powers, 27 REAL PROP., PROB., AND TR. J., Spring 1992, at 1, 1-10. Outright gifts to minors are particularly problematic. The minor usually is considered incompetent to deal with the property, and any attempt to sell exchange, mortgage, or lease the property is uncertain until the child attains majority. See Ferguson, Gifts to Minors Can Reduce Estate, But Require Choices, 50 TAX'N FOR ACCTS. 38, 42 (1993); Cornelius Coghill & Mark B. Edwards, Transfers to Minors: Basic Techniques, 4 PROB. & PROP., Jan.-Feb. 1990, at 20. In any event, because no reasonable parent would give valuable property outright to a minor, that option will not be discussed further in this article.

<sup>6</sup> Guardianships of the property, or conservatorships, generally are creatures of the common law as modified by the state. Guardianships can be extremely restrictive and dangerous for the guardian who presumes to spend the minor's money without court approval. As one author

can place the custodianship at the left, or "progressive," end: useful for reducing costs and other administrative requirements when the trustworthiness of the fiduciary is not particularly at issue. Finally, we can place the trust anywhere on this spectrum that we desire, because a trust may be written in either a conservative or progressive manner.

## The UTMA/UGMA

### What Is the UTMA/UGMA?

The UTMA/UGMA custodianship has been described as a "statutory form of trust or guardianship."<sup>7</sup> Property is transferred to a custodian, who manages the property and associated income for the benefit of the minor. When the minor reaches a certain age, any property remaining in the custodianship is distributed outright to the minor.

The custodianship is a relatively recent creation. In 1955, the New York Stock Exchange sponsored the "Act concerning Gifts of Securities to Minors" (1955 Act). The 1955 Act was created to handle the perceived need for a simple, inexpensive method for inter vivos gifts of securities to minors. Securities dealers were concerned with a particular problem created by outright transfers to minors: that the incapacity of a minor to contract could lead to a minor disaffirming a sale or purchase of a security. Under the 1955 Act, third parties dealing with custodians were protected from capricious minors.<sup>8</sup>

The 1955 Act was followed in 1956 by the UGMA, which included cash as well as securities as types of property that could be transferred into a custodianship. In 1966 the UGMA was revised and amended to increase its usefulness, both with regard to the types of property that could be placed in a custodianship and with regard to the persons or institutions that could serve as custodian. The UGMA was revised and restated in 1983, being renamed the UTMA to reflect that not all transfers possible under the new version were "gifts."<sup>9</sup>

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recently noted about guardianship law in Connecticut, "It is always a prudent practice for a guardian to get court approval before making expenditures from a minor's estate." Orsini, Guardian of a Minor's Estate: How Far Can the Guardian Go in Expending the Minor's Money?, 8 CONN. PROB. L.J. 275, 276 (1994). However, the Uniform Probate Code has varied the common law conservatorship to make it more progressive. In those states that have adopted the Uniform Probate Code, the conservator has legal title (as with a trustee) and some of the common limits on investment and court supervision requirements have been eliminated. UNIF. PROBATE CODE § 5-423(b), 8 U.L.A. 555 (1989) [hereinafter UPC].

<sup>7</sup> UTMA, supra note 1 (Prefatory Note).

<sup>8</sup> Id. Dealing with property in the name of a minor created difficulties for third parties (e.g., brokers were concerned that a minor could "disaffirm" the sale of a security). Additionally, the formal guardianship was not an adequate substitute because of the expense of setting up the guardianship and the limits on types of transactions (e.g., in some states guardians could not venture into "nonlegal" securities) and requirements for accountings. Id.

<sup>9</sup> Id. For example, a third party owing a debt to a minor may be required to transfer the money

Every state has adopted some version of the UTMA or the UGMA. As of January 1995, forty-three states and the District of Columbia had adopted the more progressive UTMA.<sup>10</sup> Additionally, the few jurisdictions still operating under the UGMA were replacing it with the UTMA at the rate of approximately two states a year.<sup>11</sup> Accordingly, the text of this article will be devoted primarily to the more progressive UTMA, with any significant variation from the UGMA mentioned in the footnotes.

### Types of Property That May Be Transferred into a Custodianship

In UTMA jurisdictions, "every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property," may be placed in custodianship.<sup>12</sup> There are no upper limits on the dollar value of property that may be transferred into a custodianship.<sup>13</sup>

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into an UTMA custodianship. Id. § 7.

<sup>10</sup> See Appendix B.

<sup>11</sup> See TJAGSA Practice Note, Testamentary Transfers Using UGMA or UTMA, ARMY LAW., Dec. 1993, at 42.

Jurisdictions adopting the UTMA have made modifications to the Uniform Law, but these variations from the uniform act tend to be "relatively minor and unimportant." McGovern, supra note 5, at 5.

<sup>12</sup> UTMA, supra note 1, § 1 (comment).

<sup>13</sup> The UTMA at § 6(c) (Other Transfer by Fiduciary) and § 7(c) (Other Transfer by Fiduciary) mentions \$10,000 limits on custodial transfers in certain situations. Id. These provisions apply to trustees, creditors, and insurance companies who have some legal obligation to the minor and desire to satisfy that obligation by creating, sua sponte, a custodianship. Neither of these provisions applies to the parent who, desiring to make an inter vivos gift or a testamentary disposition (i.e., by will or life insurance beneficiary designation), specifically references the UTMA in the transfer document.

### How to Transfer Property into a Custodianship

Transfer of property into a custodianship is relatively simple. The most common forms of transfer are inter vivos gifts and testamentary transfers.<sup>14</sup>

If ownership in the property is customarily in registered form (e.g., bank accounts, securities, automobiles) or recorded form (i.e., realty), an inter vivos transfer usually is completed by registering (or recording) ownership in the following form: "[Name of Custodian], as custodian for [Name of Minor], under the [Name of Enacting State] Uniform Transfers to Minors Act."<sup>15</sup> If ownership in the property is not customarily in registered form, a written document purporting to transfer the property into a custodianship, signed by both transferor and custodian, is necessary and sufficient to complete an inter vivos transfer.<sup>16</sup> However, for property that is not customarily in registered form, a custodianship only can be established if the transferor and the custodian are different persons.<sup>17</sup>

Once these prerequisites are satisfied, legal title to the property is indefeasibly vested in the minor.<sup>18</sup> Physical transfer of tangible property is not required, nor does the death, incapacity, renunciation, or other ineligibility of the custodian void the transfer into custodianship.<sup>19</sup> If the

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<sup>14</sup> The UTMA allows for other forms of transfer, including an irrevocable exercise of a power of appointment in favor of a minor (UTMA § 4) and sua sponte creation of custodianships by personal representatives (UTMA § 6), trustees (UTMA § 6), and other third parties (UTMA § 7) obligated to a minor.

<sup>15</sup> One also can use words to the same substantive effect. UTMA, supra note 1, §§ 3, 9. See also *Singer v. Brookman*, 578 N.E.2d 1 (Ill. App. 1 Dist. 1991) (custodianship under the UTMA or UGMA not created unless transferring document specifically references the Transfers to Minors or Gifts to Minors Act); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1984) (custodianship under the UGMA not created where account established jointly in names of parent and child).

<sup>16</sup> UTMA, supra note 1, § 9(b). Physical delivery of the property in question is not a legal prerequisite to a completed transfer. Id. (comment).

<sup>17</sup> Id. § 9. If the transferor and the custodian were one and the same, the custodianship could be subject to abuse as the proof of donative intent (the document) is controlled by the transferor. See id. (comment).

<sup>18</sup> Id. § 11. Once the custodianship is established, neither the transferor nor the custodian cannot divest the minor of the property. For example, retitling the property as Totten trust with the minor as the beneficiary is not permitted. *Matter of Estate of McGlaughlin*, 483 N.Y.S.2d 943 (N.Y. Sur. 1985). A Totten trust is a payable-on-death account in which the "beneficiary" (e.g., the child) has no rights in the account unless and until the "owner" (e.g., the parent) dies.

<sup>19</sup> UTMA, supra note 1, § 11. In *re Marriage of Stephenson*, 209 Cal. Rptr. 383 (Cal. App. 2 Dist. 1984); *Lippner v. Epstein*, 421 N.Y.S.2d 920 (N.Y.A.D. 2 Dept. 1979).



nominated custodian is unable or unwilling to serve, a successor custodian is appointed as discussed below.

Case law indicates, however, that certain situations require the inter vivos transferor to consider additional precautions when creating the custodianship. If the corpus of the transfer is community property, both husband and wife should agree in writing to the creation of the custodianship. In the absence of this agreement, the transfer may be voidable by the nonassenting spouse.<sup>20</sup> Additionally, if the transferor and the intended custodian are one and the same, the transferor also should specify in writing that the transfer is being made with donative intent.<sup>21</sup> Donative intent is necessary to complete a gift, and without a complete gift certain

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<sup>20</sup> In re Marriage of Stallworth, 192 Cal. App. 3d 742 (Cal. App. 1 Dist. 1987) (community property cannot be placed in a custodianship without written approval of both husband and wife); In re Marriage of Hopkins, 74 Cal. App. 3d 591 (Cal. App. 2 Dist. 1977) (transfer of community property without consent of spouse may be voidable by spouse); In re McCurdy's Marriage, 489 S.W.2d 712 (Tex. Civ. App. 7 Dist. 1973) (spouse's approval to transfer community property into custodianship was unclear, value of property in custodianship could be considered for purposes of division of property). But cf. Voss v. Voss, 1992 WL 120270 (Del. Fam. Ct. 1992) (In this case, the wife acquiesced in her husband's handling of family finances and the husband transferred money into custodial accounts. Because there was no evidence that husband was intentionally trying to reduce the size of marital estate in anticipation of divorce, the court would not consider custodial property to be marital property subject to division on divorce.); Poe v. Poe, 1994 WL 59418 (Va. App. 1994) (In this case, because there was no evidence of fraud, the appellate court refused to review the trial court's decision that an UGMA custodianship--created two years before a divorce action--was not marital property.); Parker v. Parker, 492 N.W.2d 50 (Neb. App. 1992) (Custodial property is indefeasibly vested and courts will not make it marital property.).

<sup>21</sup> The transferor/custodian might use language such as, "I intend by this writing to indefeasibly invest title to this property in (name of minor)." See UTMA, supra note 1, § 11(b). At common law, a completed gift required two elements: delivery and donative intent. The UTMA specifically recognizes the problem of proving delivery when the donor and the custodian are the same and there is no written requirement to document the gift. The UTMA does not allow for creation of a custodianship in this circumstance. See supra note 18 and accompanying text. However, even when written documentation of the custodianship exists (e.g., the creation of a custodial bank account) some courts have indicated that there may be a problem with the donative intent element when the transferor and custodian are one and the same. Specifically, a few courts have ruled that the mere opening of an account styled as an UGMA account (see State v. Keith, 610 N.E.2d 1017 (Ohio App. 9 Dist. 1991); Golden v. Golden, 434 So. 2d 978 (Fla. App. 3 Dist. 1983) (Golden I); Heath v. Heath, 493 N.E.2d 97 (Ill. App. 2 Dist. 1986)) or an UTMA account (see Golden v. Golden, 500 So. 2d 260 (Fla. App. 3 Dist. 1986) (Golden II)) creates only a "rebuttable presumption" of a completed gift. But cf. Allen v. Allen, 301 So. 2d 417 (La. App. 2 Cir. 1974) (opening of custodial bank account constituted completed gift). In Golden I, the court held that the testimony of the transferor that he had no donative intent was insufficient to overcome the rebuttable presumption. Accord, Heath, 493 N.E.2d, at 97. More troublingly, in Golden II, a case involving the same father transferor with a different child beneficiary, the court held that a showing of expenditures from the alleged custodial account for



advantages, such as income tax savings, may not be achieved.<sup>22</sup>

Custodianships also may be established through a testamentary disposition such as a life insurance beneficiary designation<sup>23</sup> or (in most states) a will provision.<sup>24</sup> Contingent interests become custodial property, however, only if the designation is irrevocable. For example, custodians may be nominated to receive property in a will or on a SGLI designation form, but these testamentary designations are revocable at any time prior to the death of the putative transferor.<sup>25</sup> Only at the transferor's death would the designations become irrevocable and actually transfer property ownership into the custodianship. This distinction may be important,

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child's "education, maintenance, or rehabilitation" could rebut the presumption of donative intent. Golden II seems to rely on the proposition that the father is required to provide support to his child, and any putative "gift" which is later used to satisfy an obligation of the giftor is not really a gift at all. However, Golden 2 undermines the certainty of a custodial gift, and the potential tax advantages of such a gift (see Appendix A), by allowing plaintiffs to use evidence of actions taken months or years after the time of the gift as relevant on the issue of donative intent. In the case, *In re Marriage of Agostinelli*, 620 N.E. 1215 (Ill. App. 1 Dist. 1993), the court rejected the father/ custodian's claim that he lacked donative intent because he had established the accounts for purposes of "tax avoidance." The court noted that the father had told his wife at the time of account creation that the money was for the child's education, that the father made no withdrawals until several years after the account was created, and that the father had filed tax returns for the children recognizing the account interest. If the gift does fail, the account is likely to be considered as a Totten trust--that is, an account actually owned by the putative transferor/ custodian which is payable to the minor beneficiary on the putative transferor/custodian's death. See *Application of Muller*, 235 N.Y.S.2d 125 (N.Y. Sup. 1962); *In re Miller's Estate*, 377 N.Y.S.2d 944 (N.Y. Sur. 1975) (comparing custodianship to Totten trust arrangement). The Totten trust is not a completed gift and does not have any of the advantages associated with inter vivos gifts to minors. See discussion in Appendix A.

<sup>22</sup> See *infra* notes 102-06 and accompanying text.

<sup>23</sup> UTMA, *supra* note 1, §§ 3, 7 (see also Appendix B of this article). Both the Office of SGLI and at least one commercial insurance company will accept custodianships created under any state's version of the UGMA/UTMA as proper beneficiary designations. "There are no states for which USAA Life will not accept a custodianship pursuant to that particular state's UGMA/UTMA as a beneficiary designation." Letter from Life Insurance Counsel, USAA Life Insurance Company (Oct. 12, 1993) (original on file with author) [hereinafter USAA Letter]; Message, Headquarters, Dep't of Army, DAJA-LA, subject: Elimination of By-Law Designations Under the Servicemen's Group Life Insurance Program Change, para. I (031000Z Mar 93).

<sup>24</sup> UTMA, *supra* note 1, §§ 3, 5. Although all states allow for creation of custodianships through life insurance beneficiary designations, Michigan, Mississippi, and Vermont still do not allow for custodianships created by will. See Appendix B.

<sup>25</sup> 38 U.S.C. § 1970(a) (1991).

because the conflicts of laws provisions in the UTMA are premised on the location of the parties and property as determined at the time of the property transfer.<sup>26</sup>

Custodianships for the benefit of multiple beneficiaries are not permitted.<sup>27</sup> This prohibition may or may not be onerous, depending on whether the transferor desires to divide assets in a predetermined way between beneficiaries or wants the children to receive benefits on an as-needed basis.

### Who May Serve as Custodian?

Generally, any person who has attained the age of twenty-one,<sup>28</sup> or a "trust company,"<sup>29</sup> may serve as custodian. Only one custodian is authorized.<sup>30</sup> Nonresidents and foreign citizens may serve as custodians.<sup>31</sup> If the transfer is intended to avoid estate taxes, however, having either the

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<sup>26</sup> See infra notes 77-85 and accompanying text.

<sup>27</sup> UTMA, supra note 1, §§ 10, 12(d).

<sup>28</sup> Id. §§ 1, 9. A transferor under the age of 21 may serve as custodian for certain types of property. Id.

<sup>29</sup> Id. A trust company is a financial institution, corporation, or other legal entity authorized to exercise general trust powers. Id. § 1(17).

<sup>30</sup> Id. § 10. When the state of Nevada adopted the UTMA, Nevada omitted this section (§ 10) specifically prohibiting the use of "co-custodians." However, the remainder of the UTMA (as adopted in Nevada) makes multiple references to the custodian in the singular (e.g., "the custodian," "an adult," "a trust company"). It is unlikely, therefore, that Nevada intended to create the possibility of multiple persons or entities serving simultaneously as "co-custodians." See NEV. RES. STAT. §§ 167.010 to 167.100 (1985).

<sup>31</sup> The UTMA/UGMA does not contain any residency requirements for custodians. In *Estate of Mantzouras*, 589 N.Y.S.2d 724 (Surrogate's Court, New York County, 1992), testator Mantzouras, a New York domiciliary, died and left a will providing for a substantial bequest to his grandnephew, Elias, a minor living in Greece. The will allowed the executors to make the bequest "to any relative of the minor as custodian for the minor under the applicable Gifts to Minors Act." The executors sought to give the money to Elias' father, a Greek citizen, as custodian; and a guardian-ad-litem appointed by the city challenged this custodianship on the grounds that appointment of an unbonded, nondomiciliary alien would leave no safeguards for Elias's protection. The court held that "absent a specific requirement in the UGMA that a custodian must be a resident or citizen of the United States a nonresident alien may be named custodian." Id. at 726. The court rejected application of New York's general statute on fiduciaries (which required appointment of a resident as co-fiduciary when a nonresident was named as fiduciary) because "it is clear the draftsmen of the UGMA intended that in most circumstances, a custodian would be appointed and serve without court involvement." Id. The ability to designate nonresidents and aliens as custodians is good news for the military attorney, because military clients often have relatives living away from the client's state of domicile.

transferor or the spouse of the transferor serving as custodian is inadvisable.<sup>32</sup>

The UTMA has extensive provisions for appointing a successor custodian when a nominated custodian is ineligible, unwilling, or unable to serve.<sup>33</sup> Generally, the transferor has the authority to designate a successor if a successor is needed prior to, or at the time of, the attempted transfer;<sup>34</sup> otherwise, the authority to designate a successor lies in the current custodian or, if that person fails to act, the minor.<sup>35</sup>

### Costs of a Custodianship

The UTMA provides little discussion of costs associated with the custodianship. Generally, a custodian is entitled to reimbursement from custodial property for "reasonable compensation" and "reasonable expenses incurred in the performance of the custodian's duties." "Reasonable" charges can be determined by agreement; but, failing agreement, may be established by reference to a state statute or court order. However, under no condition may a transferor who also is the custodian receive compensation.<sup>36</sup>

### The Custodian's Responsibilities

As a general matter, the UTMA gives the custodian broad discretion in handling the minor's property. If the custodian avoids a few specific problem areas, the trustworthy custodian need not worry about the possibility of legal liability to the minor or third parties.

### Investments

Initially, a custodian is required to take control of custodial property and, if appropriate, register or record the title as custodial property.<sup>37</sup> The custodian may, in his or her discretion, retain any custodial property in the form originally received. Only if the custodian intends to

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Many clients may want a foreign national, as in Mantzouras, designated as fiduciary.

<sup>32</sup> UTMA, supra note 1, § 9 (comment).

<sup>33</sup> Id. § 18.

<sup>34</sup> Id. § 18(a).

<sup>35</sup> Id. § 18(b), (c), (d). This section is complex and contains multiple limitations on who can appoint whom as successor custodian.

<sup>36</sup> Id. § 15(a), (b). Any custodian may, at his or her option, serve without compensation. Id. (comment).

<sup>37</sup> Id. § 12(a). Absent a specific court order, a custodian is not required to post a bond. Id. § 15(c).

actively manage the custodial property need the custodian be concerned with the standard of care or other liability issues discussed in this section.<sup>38</sup>

If the custodian begins to actively manage the property, the custodian may invest and manage custodial property with "all the rights, powers, and authority over custodial property that unmarried adults have over their own property."<sup>39</sup> Under the UTMA, the custodian must exercise this authority with the "standard of care that would be observed by a prudent person dealing with the property of another."<sup>40</sup>

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<sup>38</sup> See *id.* § 12(b) (comment). Thus, if the custodianship is created with some risky investment, such as a "penny stock," the custodian need not rush to sell the stocks in an attempt to avoid liability. As long as the original custodial property is properly registered and accounted for, that its value may subsequently go to zero will not give the minor any recourse against the custodian. Section 12(c) also contains limits on investments in life insurance.

<sup>39</sup> *Id.* § 13(a). Although custodians may be granted this broad power to manage property and change the form of property, why would third parties want to deal with a custodian? Third parties might have legitimate concerns about whether the custodian is properly appointed, or whether the property is being managed and expended under the proper custodial standards of care (discussed later). However, the custodianship arrangement is structured so that third parties can "act on the instruction of, or otherwise deal with," anyone holding themselves out to be a legitimate custodian or transferor. Third parties so acting, in "good faith" and in the absence of knowledge of a problem with the custodianship, are protected from personal liability to the minor or the minor's representative if that liability is premised on the invalidity of the custodianship or the impropriety of any property transaction. *Id.* § 16. Without a duty to look beyond the custodian's assertions of custodial validity and transactional propriety, third parties are more likely to deal with putative custodians. This, of course, makes the custodian's job easier. Unfortunately, this provision also makes it easier for the negligent or dishonest custodian to waste the custodial property and leave the minor without any decent remedy.

<sup>40</sup> *Id.* § 12(a), (b). The comment to § 12 indicates that this standard was intentionally varied from the UGMA standard of "one who is seeking a reasonable income and preservation of his capital." The UTMA standard was redrafted to ensure that courts would apply it as an objective standard. The original UGMA standard, which emphasized how the custodian might deal with his or her own property, was considered by some courts to be subjective. See, e.g., *Matter of Levy*, 412 N.Y.S.2d 285, 291 (N.Y. Sur. 1978) (custodian is not a fiduciary under New York laws and the UGMA standard of care is so broad that normally courts will not substitute its judgment on expenditures for that of custodian). However, the UTMA standard supersedes the UGMA standard in UGMA states subsequently adopting the UTMA standard (see *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989)), although two states (Georgia and Illinois) adopted the UTMA but specifically amended it to keep the UGMA standard; see 8B U.L.A. 537-38. In any event, a custodian who stays within the bounds set by the UTMA standard will satisfy the standard of care in UGMA jurisdictions. Aside from the standard provided in the UTMA, an UTMA custodian "is not limited by any other statute restricting investments by fiduciaries." UTMA, *supra* note 1, § 12(b). Thus, individual state laws restricting or limiting the investment powers of personal representatives, trustees, or guardians do not apply to the UTMA custodianship, effectively removing the custodianship from state law and making its application

Are certain investments too risky, so that the custodian may be liable for any loss of principle? Furthermore, are certain investments too conservative, so that the custodian may be liable for loss of income? Case law<sup>41</sup> helps to illustrate this "prudent person dealing with the property of another" standard.

First, the UTMA standard is a more conservative standard than a "prudent person dealing with one's own property," because a prudent person may take certain risks with his or her own property that a prudent person would not take with someone else's property.<sup>42</sup> The "prudent person dealing with the property of another" standard emphasizes preservation of capital over growth of capital.<sup>43</sup> Therefore, although custodians should not convert custodial property into cash under the mattress, custodians do not have to seek an investment with the highest available yield if they can cite concerns about risk or liquidity.<sup>44</sup> Thus, conservative investments are not a potential source of liability for the custodian.

Investments on the speculative end of the spectrum are another matter. Speculative investments should be avoided. For example, custodians should probably avoid investing in speculative penny stocks.<sup>45</sup> Custodians also should avoid putting custodial assets into speculative business ventures.<sup>46</sup> A custodian who wishes to invest in speculative or complex

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more uniform across the various jurisdictions. However, if an UTMA custodian has a special skill or expertise, he or she is expected to use that expertise. *Id.* § 12(c).

<sup>41</sup> The UTMA standard of care mirrors the standard established for fiduciaries in the Uniform Probate Code (UPC), UPC, *supra* note 7, § 7-302, and the case law interpreting the UPC standard may be used to interpret the UTMA standard. UTMA, *supra* note 1, § 12 (comment). Unfortunately, much of the UPC case law is useless when attempting to interpret the UTMA standard. Uniform Probate Code cases involving alleged fiduciary breaches by personal representatives often hinge on the requirement that personal representatives must settle the affairs of an estate and distribute the estate in a short period of time--considerations that do not normally impact the UTMA custodian. Some jurisdictions (e.g., Arizona) use a standard of care for trustees identical to the UTMA standard; cases interpreting the actions of a trustee in these jurisdictions also may be helpful. *See, e.g., Shriner's Hosp. for Children v. Gardiner*, 733 P.2d 1110, 1111 (Az. 1987) (*see infra* note 49 for a summary of this case).

<sup>42</sup> *See, e.g., Estate of Tessier*, 468 A.2d 590 (Me. 1983) (interpreting UPC standard of care).

<sup>43</sup> *Buder*, 774 P.2d at 1387.

<sup>44</sup> In *Estate of Tessier*, 468 A.2d 590 (Me. 1983), the court rejected the plaintiff's contention that failure to move money from bank accounts and treasury notes (then yielding from 6% to 7.5%) to six-month money market certificates (then yielding 11%) was a breach of the fiduciary duty.

<sup>45</sup> *Buder*, 774 P.2d at 1383 (UTMA custodial investment in "blue chip" stocks was acceptable, but not custodial investment in penny stocks).

<sup>46</sup> *See, e.g., Tessier*, 486 A.2d at 590.

investments is well advised to get professional advice,<sup>47</sup> although custodians must make their own decisions based on that advice and not delegate authority to others to make the decisions.<sup>48</sup>

Custodians who actively manage custodial property, however, may pick from a wide variety of acceptable investments. Savings accounts, insured certificates of deposit, treasury notes, bonds (other than junk bonds), and common stocks of highly capitalized companies<sup>49</sup> all would fall in the UTMA investment standard. Additionally, the purchase of mutual funds which invest primarily in the above investments would be acceptable.<sup>50</sup>

Aside from the general standard of care and forms of allowable investment, custodians must be aware of a few other liability pitfalls.

Custodians should be careful to identify their status (e.g., "John Doe as custodian for Jim Doe") on all documents (such as account forms, purchase agreements, contracts) generated during the course of the custodianship. Proper identification of custodial status limits the potential for personal liability in the event of a lawsuit involving an alleged breach of contract or tort.<sup>51</sup>

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<sup>47</sup> See Estate of Falk, 1991 WL 6380 (Minn. App. 1991) (interpreting UPC standard of care). In Falk, a personal representative was found to have breached his fiduciary duty. Under the terms of a land contract, the personal representative had the power to cancel the contract, get the land back, and keep all previous payments as liquidated damages if the debtor defaulted. When the debtor did default, the personal representative settled with the debtor by allowing him to keep one quarter of the land in exchange for returning the rest. The court stated that the personal representative should have investigated the enforceability of the contract, the money needed to enforce the contract, and the recovery that could have been had, prior to settling with the debtor.

<sup>48</sup> See Shriner's Hosp. for Children v. Gardiner, 733 P.2d 1110, 1111 (Az. 1987) (interpreting Arizona trustee standard of care identical to UTMA standard of care). In Shriner's, a trustee allowed a stockbroker to make independent decisions about purchases and sales of stock. The court held that the trustee's delegation of responsibilities that she could reasonably be expected to perform herself (the purchase and sale decisions) was a breach of the fiduciary duty.

<sup>49</sup> For purposes of trust law, investment in "speculative" stocks can be avoided by purchasing stocks in "established or seasoned" companies and avoiding "newer or smaller" companies. See GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 612 (rev. 2d ed. 1980).

<sup>50</sup> UTMA, supra note 1, § 12 (comment). However, mutual funds carry some risk for the custodian. First, the custodian may not be able to ascertain exactly what the fund manager is investing in (e.g., as with the recent problem of derivatives in the bond market). Second, if the fund is invested in risky assets and the fund loses money, the custodian could be held liable for letting someone else (e.g., the fund manager) make decisions. See Shriner's, 733 P.2d at 1110.

<sup>51</sup> For contract claims, the custodian will not be personally liable on the contract so long as the custodial capacity was identified, either orally or in writing, when entering into the contract. UTMA, supra note 1, § 17(b)(1). Additionally, the custodian will not be personally liable on a claim sounding in tort or other claim arising from ownership of custodial property unless the



Certain property should not be commingled. For example, the custodian should not mix custodial property with noncustodial property.<sup>52</sup> Additionally, custodial property maintained for different beneficiaries should not be commingled.<sup>53</sup> Finally, even in cases where the custodian is only handling custodial property for a single beneficiary, the custodian should keep property transferred in different ways (e.g., inter vivos versus testamentary) separate if the age of mandatory distribution varies depending on how the property is transferred.<sup>54</sup>

Custodial property may not be placed in a joint tenancy with right of survivorship,<sup>55</sup> although joint ownership in the form of tenants in common is permissible.<sup>56</sup>

Although the UTMA is silent on the issue of self-dealing, the custodian probably should avoid any transactions that might give the appearance of benefiting the custodian at the expense

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custodian was "personally at fault." *Id.* § 17(b)(2). Likewise, a minor is not personally liable unless personally at fault. Thus, third-party creditors generally are limited to claims against the custodial property. *Id.* (comment).

<sup>52</sup> *Id.* § 12(d). But see *Matter of Levy*, 412 N.Y.S.2d 114 (N.Y. Sur. 1978) (commingling of funds in UGMA jurisdiction will not be punished in absence of bad faith, willful wrongdoing, or gross negligence). In *Gray v. United States*, 738 F. Supp. 453 (N.D. Ala. 1990), a custodian mingled her own personal funds with custodial assets. The Internal Revenue Service (IRS) taxed the custodian on the income from all the assets in the account, including those assets that were arguably custodial assets. The custodian challenged the assessment, and the court held for the IRS.

<sup>53</sup> UTMA, supra note 1, § 12(d).

<sup>54</sup> *Id.* (comment); see also Appendix B (for variations in age of distribution by method of transfer). For example, a minor may, on a parent's death, receive custodial assets through both an SGLI designation and through a will provision. Only a minority of states (about fourteen, see Appendix B) set the same mandatory ages of distribution for these two types of transfers. If the custodian is operating under some other state's UTMA, and starts mixing the life insurance proceeds with the probate proceeds--buying and selling assets--the custodian could encounter a significant accounting problem when the minor reaches the first age of distribution.

<sup>55</sup> UTMA, supra note 1, § 12 (comment). A custodian may receive property transferred in joint tenancy with right of survivorship and may retain property so transferred, but may not actively convert any property to that form. *Id.*

<sup>56</sup> *Id.* § 12(d).

of the custodial property.<sup>57</sup>

Finally, custodians should not give away property for inadequate consideration,<sup>58</sup> and custodians of tangible property should keep the property in good operation and repair.<sup>59</sup>

### Expenditures

The custodian has broad discretion to spend custodial property on behalf of the minor. Specifically, the custodian may spend any monies that the custodian "considers advisable for the use and benefit" of the minor.<sup>60</sup> This "use and benefit" standard includes support and maintenance of the minor, but goes beyond that to include such items as payment of legally enforceable obligations (such as payment of tort claims against the minor or taxes owed by the minor).<sup>61</sup>

Neither the UTMA nor the case law on custodianships provide further insight into the meaning of "considers advisable for the use and benefit." If the custodian can articulate how a particular expenditure benefits the minor, either directly or indirectly,<sup>62</sup> the custodian should be

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<sup>57</sup> For example, the general law of trusts, as it has developed in the various states, prohibits a trustee from selling or buying trust property. BOGERT, *supra* note 50, § 543(A). As a general matter, trustees also are prohibited from taking trust property as an offset against debts allegedly owed by the trust beneficiaries to the trustee. *Id.* § 814.

<sup>58</sup> Fogelin v. Nordblom, 521 N.E. 2d 1007 (Mass. 1988) (custodian was grossly negligent and breached fiduciary duty by relinquishing property for inadequate consideration); Hirschberger, By and Through Olson v. Griggs County Social Servs., 499 N.W.2d 876 (N.D. 1993) (conservator breached fiduciary duty by failing to ascertain value of property before renouncing it).

<sup>59</sup> See, e.g., Estate of Baldwin, 442 A.2d 529 (Me. 1982) (interpreting UPC standard of care). In *Baldwin*, a bank appointed as executor violated its fiduciary obligation when it failed to inventory and monitor the ongoing operations of a family business placed in its care.

<sup>60</sup> UTMA, *supra* note 1, § 14(a). The UGMA standard is different: the custodian in an UGMA state may use custodial property "for the support, maintenance, education, and benefit of the minor." UGMA, *supra* note 2, § 4. The UTMA drafters changed this standard to remove any inference that the custodian was limited only to providing the minors' "required support." UTMA, *supra* note 1, § 14 (comment).

<sup>61</sup> UTMA, *supra* note 1, § 7 (comment). If the minor has a child, custodial assets may be used to pay the child support obligation. If the minor is married and then divorces, the spouse has no right of election against custodial assets. *Id.*

<sup>62</sup> The UTMA does not provide guidance on whether and how custodial monies may be paid over to a third party (e.g., a guardian of the person of the minor or a relative of the minor) for the ultimate use of the minor. The law of trusts varies from state to state on whether a trustee, in the absence of specific guidance in the trust, can assume good intentions on the part of a guardian



protected from liability. The custodian is probably best advised, however, to avoid using custodial property to make charitable gifts<sup>63</sup> or using custodial property in any way that gives the appearance of self-dealing.<sup>64</sup>

A court may order a custodian to use custodial assets as the court considers advisable for the use and benefit of the minor.<sup>65</sup> Either an "interested person" or a minor who has attained the age of fourteen may petition a court to intervene.<sup>66</sup> The term "interested person" includes the transferor, a parent, a conservator, a guardian, a public agency, or a creditor.<sup>67</sup>

### Mandatory Distribution

At some point, custodial property must be distributed outright to the minor. The age of required distribution depends, however, on how the property was transferred. The UTMA provides that property transferred pursuant to an inter vivos gift, an exercise of a power of appointment, by will, or by the terms of a trust, will be distributed to the minor when the minor reaches the age of twenty-one.<sup>68</sup> The age of distribution for other UTMA transfers (such as testamentary transfers through life insurance designation, an employee benefit plan, or a payable on death account) is tied to the age of majority in the enacting state.<sup>69</sup> However, some states enacting UTMA and UGMA have changed the ages of mandatory distribution as originally set forth in the uniform acts. Additionally, several states actually allow the transferor, when establishing the custodianship, discretion to vary the age of distribution within a fixed range of ages. The age of distribution is set by inserting, in the writing creating the custodianship, words to the effect of, "The custodianship is to continue until the age of (fill in the desired age)."<sup>70</sup> The

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and so pay over the beneficiary's money to that guardian. See BOGERT, supra note 50, § 814. As a prophylactic matter, the custodian who provides money to a third party probably should provide written guidance to the third party on the use of the funds and demand some sort of accounting (e.g., paid receipts) from the third party.

<sup>63</sup> This action may be interpreted as giving away property for inadequate consideration. See supra note 59 and accompanying text.

<sup>64</sup> See supra note 58 and accompanying text.

<sup>65</sup> UTMA, supra note 1, § 14(b).

<sup>66</sup> Id.

<sup>67</sup> Id. § 14 (comment).

<sup>68</sup> Id. § 20(1).

<sup>69</sup> Id. § 20(2).

<sup>70</sup> Most parents probably would want distribution delayed as long as possible, within reason, to ensure that the child has enough maturity to handle the property. Alaska, California, and Nevada currently allow the parent to vary the age of distribution from 18 to 25 years of age. Arkansas, Maine, New Jersey, New York, North Carolina, and Virginia currently allow the parent to vary

actual requirements of each state are listed, by state and type of custodial property, at Appendix B.

### Recourse Against the Custodian

Very few reported cases contain allegations of custodial neglect or abuse.<sup>71</sup> But what if the minor or other interested party is unhappy with the custodian? On proper petition, a court may remove a custodian. A minor who has attained the age of fourteen, the transferor, an adult member of a minor's family, the minor's guardian, or the minor's conservator may petition the court to remove the custodian and appoint a successor custodian, or, alternatively, to have the custodian post a bond.<sup>72</sup>

Courts may require custodians to pay the minor damages for any breach of fiduciary duty that causes a loss of custodial property.<sup>73</sup> The custodian also may be required to pay the minor's attorneys fees.<sup>74</sup>

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the age of distribution from 18 to 21 years of age. For the requirements of specific jurisdictions, see Appendix B.

<sup>71</sup> The paucity of court cases in this area might have various explanations. Some custodial abuse probably is never discovered because the property is lost or converted and the minor never learns of the existence of the custodianship. In other cases, the abuse may be discovered, but the minor (or the minor's representative) desires not to upset family harmony and takes no legal action. See McGovern, supra note 5, at 16. The few reported cases include *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989); *Matter of Levy*, 412 N.Y.S.2d 285 (N.Y. Sur. 1978) (custodian/mother used custodial proceeds to pay back mother's personal loan); *Roig v. Roig*, 364 S.E.2d 794 (W. Va. 1987) (custodian/mother used custodial proceeds to buy fur coat).

<sup>72</sup> UTMA, supra note 1, § 18(f).

<sup>73</sup> *Buder*, 774 P.2d at 1389. Although the UGMA contains a specific provision making the custodian liable (and authorizing the payment of damages) for losses incurred due to bad faith, intentional wrongdoing, gross negligence, or imprudent investing (see UGMA, supra note 2, § 5), the UTMA does not discuss custodial liability. The *Buder* court reasoned, however, that the minors' right to demand an accounting from the UTMA custodian (UTMA, supra note 1, § 19) encompasses the right to sue the custodian for damages.

<sup>74</sup> *Buder*, 774 P.2d at 1386.

## Choice of Law

Although the UTMA and UGMA are uniform acts, they have been adopted with variations between jurisdictions. Most of these variations are insignificant, but a few variations may be important.<sup>75</sup> With clients who come from state A, are presently in state B, consider themselves domiciliaries of state A, B, or C, and may eventually move to state D, the military attorney needs to understand the choice of law and conflicts of law provisions contained in the UTMA/UGMA.

The transferor designates the state law of choice by reference to that state at the time the custodianship is created. The state selected, however, must have some minimum connections with the UTMA transaction. Specifically, at the time of the transfer, either the transferor, the minor, or the custodian must be a resident of the nominated state, or the custodial property must be located in the nominated state.<sup>76</sup> The state courts in every UTMA state are bound to follow the particular version of the UTMA or UGMA in the state nominated by the transferor.<sup>77</sup> However, if at the time the custodianship is created, insufficient nexus with the selected state exists, the courts of any UTMA state that had sufficient nexus at the time of attempted creation may save the custodianship by applying their version of the UTMA.<sup>78</sup>

What does all this mean for the military attorney advising a client on the creation of a custodianship? Usually, the attorney will be looking for a state that has an UGMA/UTMA that allows for the particular type of transfer<sup>79</sup> and that allows for an older age (either twenty-one or twenty-five) as the age of mandatory distribution. If the soldier is domiciled in such a state, reference the state of domicile in the will or life insurance designation. If the soldier is not domiciled in an appropriate state, consider whether the custodian of choice resides in such a state. For significant amounts of money, selection of a corporate custodian<sup>80</sup> in such a state

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<sup>75</sup> For example, the age of mandatory distribution varies from state to state, and a few of the UGMA jurisdictions do not allow for the creation of custodianships by will. See Appendix B.

<sup>76</sup> UTMA, supra note 1, § 2(a). The UGMA contains no conflicts of law provisions.

<sup>77</sup> Id. § 2(c). The UTMA in the state of choice applies even if, after creation of the UTMA, the minor, the property, or the custodian move to another state. Id.

<sup>78</sup> Id. § 21.

<sup>79</sup> That is, by inter vivos gift, by will, or by life insurance beneficiary designation.

<sup>80</sup> The author performed an informal survey of bank trust departments--Jefferson National, Crestar, and Central Fidelity--in Charlottesville, Virginia (the Virginia version of UTMA has a mandatory age of distribution up to age 21). All three banks indicated that they would accept a nomination as an UTMA custodian, if the amount of custodial property was sufficient. One bank indicated that, to make the custodianships economically viable, a minimum of \$75,000 per beneficiary would be necessary to fund the custodianships. That same bank quoted an annual administration fee of the sum of 5% of income and .4% to .8% of assets (depending on the total amount of assets in the custodianship). If a soldier wants to nominate a corporate custodian for a testamentary custodianship, advise the soldier to contact the bank to ensure that it accepts such

would be a viable alternative. If the custodian does not have the proper connections with the state, and an insurance designation is at issue, consider selecting an insurance company located in an appropriate state.<sup>81</sup> Any of these connections would meet the minimum nexus requirements.

In the worst case scenario, the soldier selects a state without the minimum nexus requirements (unlikely, with proper planning) and all of those states that have some minimum nexus to either the soldier, the property, or the custodian are UGMA (not UTMA) states (an even more unlikely possibility). Because the UGMA, unlike the UTMA, does not have any conflicts provisions, the validity of the custodianship would be uncertain. The courts in these UGMA states probably would follow the intent of the transferor and provide for the creation of a custodianship pursuant to their custodial laws, but it is possible that the custodianship would fail and the property would be transferred into a guardianship.

What happens if property is transferred pursuant to a given state's UGMA, and that state subsequently enacts the UTMA? The UTMA provides guidance on this issue. Property transferred pursuant to a given state's UGMA will be governed by the provisions of that state's UTMA, when, and if, the UTMA is adopted in that jurisdiction. However, the UTMA provisions will not apply where the application of the UTMA would deprive the minor of "constitutionally vested" rights in the UGMA property or would extend the age of distribution applicable under the UGMA.<sup>82</sup>

#### **Testamentary Planning: A Summary Comparison of the UTMA/UGMA with the Alternatives**

From the information provided to this point, an LAA should be comfortable in deciding whether the custodianship would work for a particular client and, if so, how to make the custodianship happen. However, even if workable, the custodianship may not be the best choice for a particular client. The LAA should be cognizant, therefore, of the two primary alternatives to the custodianship (i.e., trusts and guardianships) and the relative advantages and disadvantages of each. The attorney may want to recommend some alternative to the custodianship (e.g., a

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custodial responsibilities. The bank probably will want a letter informing the bank of the nomination and containing any guidance on the use of the funds (e.g., primarily to fund college education) that the soldier might have. This letter is not a legal requirement and not legally binding on the bank. However, the letter will help the bank when the soldier dies, the insurance claim forms have to be filed, and the bank, ultimately, is considering how to spend the money for the "use and benefit" of the minor.

<sup>81</sup> Unfortunately, the Office of SGLI is located in New Jersey, a state that currently uses the age of majority (18) for the age of distribution in custodianships created by insurance. See Appendix B.

<sup>82</sup> UTMA, supra note 1, § 22 (comment). However, property received under the UGMA should not be commingled with property received under the UTMA. See Thomas E. Allison, The Uniform Transfers to Minors Act—New and Improved, But Shortcomings Still Exist, 10 U. ARK. LITTLE ROCK L.J. 339, 360 n.150 (1988).

trust), even if such a recommendation means referring the clients to another attorney for implementation. Because military clients are much more likely to seek and receive advice on testamentary planning (i.e., wills and life insurance) than inter vivos planning,<sup>83</sup> the comparison of alternatives is made assuming a testamentary disposition and an intent to establish postmortem control mechanisms.<sup>84</sup>

### Comparison of Custodianships with Trusts

As discussed in the introduction, a custodianship is a progressive form of property management for the minor. A trust, on the other hand, can be designed by the settlor in a number of different ways--to include provisions that make the trust either a conservative or a progressive transfer vehicle. Despite variations in the form of trusts, trusts and custodianships can be compared in a general fashion and relative advantages and disadvantages ascertained.

### Potential Advantages of Custodianships

Testamentary custodianships offer several advantages in comparison with trusts. The primary advantage, particularly for the military attorney, results from the custodianship being a uniform act recognized in all jurisdictions. Once established, the operation of the custodianship under various circumstances is fairly easy to predict regardless of the jurisdiction. Thus, a military attorney can comfortably answer the "what if" questions of a client, whereas the same "what if" questions in the context of a trust may require specific knowledge of a state's trust law. Topics of specific concern might include the execution of the trust, funding of the trust, fiduciary responsibilities, and public policies affecting the interpretation and administration of the trust. Some additional advantages of the custodianship follow.

A custodianship can be established informally and usually with just a few written words. A trust document, on the other hand, may be several pages long and may require certain formalities in its execution.

Any nonresident may be selected to serve as a custodian. State fiduciary law varies, however, on whether, and under what circumstances, a nonresident can be named as a trustee. Income taxes are a relatively simple proposition for a custodianship. All income on custodial property is immediately taxable to the minor, whether or not the custodian distributes or otherwise expends the income during the year the income is received. On the other hand, the trust is a separate taxable entity that must prepare separate tax forms for income that is not distributed by the trust in the year received.<sup>85</sup>

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<sup>83</sup> See supra note 4 and accompanying text.

<sup>84</sup> All transfers to minors can be divided into two different categories: testamentary transfers and inter vivos transfers. The primary purpose of testamentary transfers is usually to establish control mechanisms that ensure minors are properly cared for after the death(s) of their parent(s). The primary purpose of most inter vivos transfers to minors is the potential for property conservation through tax savings: savings on income taxes, gift taxes, and estate taxes. See Appendix A for further discussion of inter vivos transfers.

<sup>85</sup> Until recently, the trust could be used as an income tax saving device by splitting income

Finally, when a custodianship is designated as a life insurance beneficiary, payment to the custodian should be made immediately after death without any court intervention. However, the same life insurance company may not pay immediately on a trust designation.<sup>86</sup>

### Potential Advantages of Trusts

However, the custodianship may not be the best vehicle for every testamentary distribution to a minor. The trust option offers some potential advantages over a custodianship.

The mandatory age of distribution of custodial assets varies depending on the state and type of transfer, but usually is eighteen or twenty-one.<sup>87</sup> If the assets are significant, many transferors will want to avoid the possibility of an irresponsible young adult wasting the funds, or, even worse, relying on the funds to the detriment of career development.<sup>88</sup> A trust allows the settlor great flexibility to designate the age of distribution.<sup>89</sup>

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between the trust and the minor. However, the recent increase in trust income tax rates virtually eliminated this advantage. For example, in 1995, only the first \$1550 in trust income is taxable at the lowest rate (15%). Trust income above \$1550 is taxed at marginal rates of 28-39%. See FEDERAL TAX HANDBOOK, para. 1106 (Research Institute of America, 1994) [hereinafter FEDERAL TAX HANDBOOK].

<sup>86</sup> Payment of life insurance proceeds payable to, or on behalf of, a minor generally will be delayed pending court intervention. For example, when a minor is named outright as the insurance beneficiary the insurance company (including OSGLI) will, generally, pay only the court-appointed conservator; and when a testamentary trust is named as the designated beneficiary the insurance company generally will require court approval of the trust document. Only when an inter vivos trust or a custodianship is designated as the insurance beneficiary will the insurance company pay without court intervention. See DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE, para. 11-30e(1)(a), g(1)(a) (20 Oct. 1994) (OSGLI does not require court intervention for inter vivos trusts or custodianships); USAA Letter, supra note 24 (USAA generally will pay on an inter vivos trust or a custodianship designation within three business days of receiving certified death certificate).

<sup>87</sup> See chart at Appendix B.

<sup>88</sup> A trust is the only option that keeps the property out of the hands of the beneficiary for as long as the settlor may desire.

<sup>89</sup> The problem of premature distribution, however, can be mitigated even in a custodianship. For example, the transferor can invoke the custodial act of a state that has a later age of mandatory distribution; to include a few states that allow for mandatory distribution as late as the age of 25. See chart at Appendix B. The choice of law rules provide the transferor with significant leeway in selecting the applicable state. See supra notes 77-83 and accompanying text. Additionally, the transferor could limit the dollar amount of assets in the custodianship and indicate to the custodian that the intended purpose of the transfer is to care for the minor prior to the age of distribution. The funds should be used by the custodian for expenses such as college tuition and the amounts remaining at the age of distribution would not then be too significant.



The trust option offers the settlor more flexibility than the custodianship in other matters. For example, the settlor may designate specifically what the trustee can (and cannot) do with the assets as far as investments and expenditures. Although the transferor in a custodial situation informally can advise the custodian on the transferor's desires, these desires cannot be legally enforced.

Another potential advantage of the trust option is the ability to establish one trust for multiple beneficiaries. In contrast, a single custodianship cannot be used for the benefit of multiple minors. If more than one minor is involved, a separate custodianship must be established for each. The funds available for transfer must be split between the custodianships, and, hence, between the minors. Therefore, even if the same person is designated as custodian for all the minors, the custodian does not have discretion to use one minor's funds for another minor. This limitation may be undesirable where the transferor wants the fiduciary to use the money for a group of children on an "as needed basis," but the limitation might be acceptable if the transferor does not want one child (e.g., a special needs child) to use up all the funds available to the children.

A trust may include a spendthrift provision,<sup>90</sup> while the custodial acts contain no spendthrift protections. The absence of spendthrift provisions in the UTMA raises a concern that a beneficiary might use custodial property as collateral, or that a beneficiary might incur debts and a judgment creditor might attempt to enforce the debts against custodial assets.<sup>91</sup> For beneficiaries who have not reached the age of majority, the absence of spendthrift provisions should not be of much concern. Third parties transact business with these parties at their own risk: except for torts or the cost of necessities, the minor has the power to disaffirm any transactions.<sup>92</sup> The more serious problem involves beneficiaries who have achieved majority but have yet to reach the age of mandatory property distribution. Hopefully, parents will have some idea of whether their children are likely to become spendthrift problems. If they are, and significant assets are to be transferred, the custodianship may not be an appropriate vehicle.<sup>93</sup>

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<sup>90</sup> A "spendthrift" provision operates to bar creditors of the beneficiary from access to the principal and income of the trust. The spendthrift provision prevents the beneficiary, prior to distribution of trust property, from assigning or pledging the trust property as collateral. Most states recognize and enforce spendthrift trusts. See BLACK'S LAW DICTIONARY 1256 (5th ed. 1979).

<sup>91</sup> UTMA, supra note 1, § 17 (comment) recognizes that custodial assets may be used to pay any legal obligation of the beneficiary and that the assets may be reached by creditors.

<sup>92</sup> RESTATEMENT (SECOND) OF CONTRACTS § 14, cmt. b (1981).

<sup>93</sup> Does a transferor or custodian have any duty to tell a beneficiary about the existence of the custodianship or custodial property? The UTMA and UGMA do not specifically mention this type of a duty, and no reported cases on this issue exist. The UTMA provides, "A custodian shall . . . make (tax records) available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has reached the age of 14 years."

UTMA, supra note 1, § 12(e). In any event, the custodian would find it difficult to conceal the

### Comparison of Custodianships with Guardianships

Another alternative for transfer to minors is the guardianship of the minor's property, or conservatorship.

#### Potential Advantages of Custodianships

In general, when comparing the custodianship with the guardianship, the custodianship presents many of the same advantages that it has over the trust. For example, the law of guardianship is state specific and is difficult for the military attorney to research and advise on: a nonresident may not be able to serve as guardian; insurance proceeds will not be payable to a guardian without court intervention.

The custodianship has additional advantages over guardianships. The custodianship offers the possibility of flexibility in the age of mandatory distribution, while the guardianship offers no flexibility. The guardianship will terminate when the minor reaches the age of majority (eighteen in almost every state). The minor is then likely to receive the distribution of remaining assets from the guardian at an age when the minor still is probably too immature to safeguard the assets.

Unlike a guardian, a custodian will not have to post bond or endure periodic accountings by a court. Therefore, the custodian's job is easier than that of a guardian and the expenses associated with a guardianship (i.e., costs for bond premiums, attorney's fees, court filing costs) are either reduced or eliminated.

The custodian also has flexibility, in both investments and distribution of property, that a guardian may not have. Guardians may be advised to seek court approval for any significant expenditure or investment decision.

Custodians have all the rights to handle property that unmarried adults have with their own property, and good-faith third parties can rely on the custodian's assertions of the validity of the custodianship and proper use of the custodial property. However, guardians do not usually acquire title to the ward's property, and the acts of guardians, if without authority, may be voidable at the expense of third parties. Thus, third parties may be reluctant to deal with guardians.<sup>94</sup>

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existence of a custodianship from a beneficiary who has reached the age of majority, because any custodial income must be reported on the beneficiaries' tax return and so, by implication, the information would have to be provided to the beneficiary.

<sup>94</sup> McGovern, supra note 5, at 3, (citing 36 WIS. B. BULL., Feb. 1963; RESTATEMENT 2D OF TRUSTS § 7 cmt. a (1959)).



## Potential Advantages of Guardianships

Guardianships are structured primarily with the concept of asset protection in mind. The requirement to post bond, the limits on the guardian's ability to expend and invest assets, and the close court supervision ensure that the guardian will not, through misconduct or neglect, waste the minor's assets. The custodianship does not contain any significant oversight checks on the custodian and if the fiduciary is potentially incompetent or dishonest, then a guardianship would appear to be a preferred vehicle. After all, if there is no property to expend or invest, the above listed advantages in a custodianship become meaningless.

The possibility of waste or abuse in a custodianship situation can, however, be mitigated. The mitigation is accomplished primarily through careful consideration of who (or what) should serve as custodian. The transferor should be able to find someone (usually, a relative) who is both trustworthy and financially competent. If the transferor is contemplating nominating someone who is trustworthy, but not particularly knowledgeable about financial management, that person still may be able to serve effectively as custodian if they seek financial advice from professionals--something that the transferor could instruct on in a separate writing. Finally, a corporate fiduciary always remains a possibility when considering a custodianship. As custodian, a bank can provide expert financial management skills for minimal cost,<sup>95</sup> and the bank's deep pockets reduce or eliminate the need for the protections inherent in the guardianship.<sup>96</sup>

## Conclusion

Let us return to our initial scenario: a military officer (Colonel Lee) is conducting estate planning with her family (a husband and a young son) in mind. Colonel Lee decides to participate in the SGLI at the maximum amount: \$200,000 in coverage. She wants to list her husband as primary beneficiary and her son, by name, as contingent beneficiary.

Fortunately, Colonel Lee goes to the legal assistance office for advice on the SGLI designations. The LAA explains the various options, along with their pros and cons, that Colonel Lee may use to protect her son. The LAA is not familiar with the particular trust and guardianship laws of Colonel Lee's domicile, but feels comfortable with the UTMA and recommends it as appropriate in Colonel Lee's case. However, Colonel Lee lives in state X, and the UTMA as adopted in that state has a mandatory age of distribution of eighteen for life insurance custodianships. However, Aunt A lives in state Y, and the LAA notes that the UTMA age of distribution in state Y is twenty-one. With a few strokes of the typewriter, the SGLI form is completed: the contingent beneficiary is Aunt A, as custodian under the UTMA of state Y, for the benefit of the child.

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<sup>95</sup> See *supra* note 83 and accompanying text.

<sup>96</sup> If an individual custodian wastes or abuses custodial assets, the individual custodian may not have any significant assets of his or her own and so may be judgment proof. The bank, on the other hand, could be forced to make good on the waste or abuse of one of its trust officers.

Unfortunately, Colonel Lee and her husband are subsequently killed in a car accident. Her son is seventeen years old at the time. The Office of SGLI immediately pays the UTMA custodian. That Aunt A is not a resident of the Lee's domicile is irrelevant as far as the Office of SGLI is concerned. There are no extensive court proceedings, no delays, no court costs, no bond, and no residency requirements. The boy's eighteenth birthday--the age of majority--is fast approaching--but there is no need to rush any custodial spending decisions because the custodianship extends for an additional three years beyond his majority. On his eighteenth birthday the boy receives a dictionary and a thesaurus (in lieu of a fast car and a boat). The boy then enters college, the custodian pays the tuition, and the boy goes on to be a scholar and a gentleman.

## APPENDIX A

### The UTMA/UGMA and Inter Vivos Transfers

The article focused on the use of the UTMA/UGMA custodianship as a vehicle for testamentary transfers. However, some LAAs may find themselves providing advice on inter vivos, or lifetime, gifts of property to children. This Appendix addresses some of the issues surrounding the use of the custodianship as a vehicle for inter vivos transfers.<sup>97</sup>

The primary motivation for most inter vivos transfers of valuable property from parent to child is tax savings.<sup>98</sup> Specifically, gifts to minors may reduce the rate at which income generated by the property is taxed<sup>99</sup> and may reduce the size of the donor's estate for purposes of estate taxes.<sup>100</sup>

Most military families are probably not in a position to obtain, or even need, these potential

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<sup>97</sup> The focus is on the parent as donor, although some of the discussion also applies to other adults as donors.

<sup>98</sup> See Atkinson, Gifts to Minors: A Road Map, 42 ARK. L. REV. 567, 568 (1989). Another possible reason to transfer property to minors is to disinherit a spouse, and the custodianship may have some value here. However, in some community property states, the transferor will find it difficult to convert community property into custodial property (See supra note 21 and accompanying text). In noncommunity property states, the transferor may attempt to convert his or her property into custodial property and thus reduce the size of the estate available for the spousal right of election. In many states, however, the spouse now may elect against an "augmented" estate which generally includes property transferred without consideration within a certain number of years of death. See, e.g., UPC, supra note 7, § 2-202(1)(iv) (covers transfers made within two years of death). But cf. In Re Zeigher's Estate, 406 N.Y.S.2d 977 (Nassau Sur. 1978) (surviving spouse could not reach property transferred into a custodianship because this property was not part of the defined New York augmented estate); In Re Estate of Schwartz, 295 A.2d 600 (Pa. 1977) (same result, under Pennsylvania law, as Zeigher).

<sup>99</sup> See UTMA, supra note 1, §§ 1 (comment), 9 (comment). For example, using the 1995 tax laws, property held by a married parent would generate income taxed at a 28% rate (assuming the total taxable income of the parent rests between \$39,000 and \$94,250). FEDERAL TAX HANDBOOK, supra note 86, para. 1103. The same property, transferred to a child age 14 or older, would generate income up to \$650 that is not taxable (because of the child's standard deduction), and income in from \$650 to \$22,100 would be taxed at only a 15% rate. For children under 14, however, this tax shelter is limited to a total of only \$1300 in income, after which additional income is taxed at the parent's marginal rate. Id. paras. 1102, 3134-36.

<sup>100</sup> Donors may transfer up to \$10,000 a year, per donee, without incurring any gift tax liability. I.R.C. § 2503(b). The ultimate estate tax savings on the value of the property transferred may be amplified if the property transferred generates significant income, or appreciates rapidly in value, between the time of transfer and the donor's death. Atkinson, supra note 99, at 569-72.

tax savings. First, many families are not currently paying income tax at high marginal rates, and so transfer of assets to a child would not provide significant income tax relief. Second, many military families will not have sufficient assets (e.g., \$600,000 or more)<sup>101</sup> to subject the estate to any federal estate tax, so that inter vivos transfer of assets to a child would provide any benefit in the form of estate tax relief. Finally, many military families do not have assets that they can afford to tie up in a child's name.

However, some families will meet these particular threshold requirements. For these families, the usefulness of the custodianship as a tax saving inter vivos gifting device may depend on the ultimate use for which the donor (parent or grandparent) intends the property. That is, does the parent intend that the property be conserved for ultimate distribution to the minor when the minor reaches the age of distribution? Or does the parent intend that the property be expended during the course of the custodianship?

If the donor views the gift primarily as property to be conserved during the term of the custodianship--for the property to be distributed in a lump sum when the minor reaches age eighteen or twenty-one--the custodianship works well. Transfers made pursuant to the UGMA/UTMA are indefeasibly vested in the minor. Income generated by the custodial assets is taxable to the child, not the parents. Property transferred into a custodianship is considered a completed gift which qualifies for the annual \$10,000 gift tax exclusion. Finally, the property transferred is removed from the parent's gross taxable estate, so long as the parents also do not serve as custodians.<sup>102</sup> Thus, for inter vivos gifts, a relative or corporate fiduciary should probably serve as custodian.

More commonly, however, the parents want to use the custodianship as a college fund--to use all, or at least a significant part, of the custodial property to pay for college expenses. Because forty-two states allow for creation of a inter vivos custodianship which will terminate when the minor reaches age twenty-one (or later),<sup>103</sup> the custodianship also would appear to be ideally suited to the college funding task.

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<sup>101</sup> The unified credit against federal estate taxes is currently \$192,800. I.R.C. § 2010(a). "The effect (of the unified credit) is to exempt up to \$600,000 from estate taxation." FEDERAL TAX HANDBOOK, supra note 86, para. 5028.

<sup>102</sup> The IRS takes the position that a donor/custodian has sufficient interest in custodial property to include that property in the donor custodians estate under I.R.C. §§ 2036 and 2038. See UTMA, supra note 1, § 9 (comment) (citing various Revenue Rulings and Estate of Prudowsky v. Commissioner, 55 T.C. 890, aff'd per curiam, 465 F.2d 62 (7th Cir. 1972)). The UTMA (§ 20(3)) also provides that, in the event of the minor's death, custodial property becomes part of the minor's estate. The intestate laws of the various states provide that parents are the primary takers of children's estates. Even parents who create a custodianship to remove property from their estate and appoint a third party custodian will find the property back in their estate if the minor dies before the parent donor. See McGovern, supra note 5, at 12.

<sup>103</sup> See Appendix B.

The use of custodial assets to fund college expenses, however, raises some troubling issues. Two issues are of particular concern: Does the parent's obligation to support the child under state law include providing a college education? And will the transfer of property from the parent into the custodianship undercut the parents' ability to qualify for state and federal financial aid?

If, as part of a parent's obligation to support his or her child, state law requires that the parent pay for all or part of a child's education, then the use of custodial funds to pay for a child's college expenses creates two related dangers for the parents. First, a minor is not legally required to use his or her funds to fulfill the support obligation of the parents, so the parent custodian's use of custodial funds (which belong to the minor) may be a breach of the fiduciary duty of the custodian and ultimately result in a lawsuit against the custodian.<sup>104</sup> Additionally, the IRS may view any amounts expended out of a custodianship in fulfillment of a legal support obligation of a parent as income to the parent.<sup>105</sup> If custodial property spent on college costs is taxed to the parent as income, the custodianship will be transformed from a tax saving device to a tax trap for the parent.

Whether or not the payment of college expenses is a parental support responsibility depends on state law, and the answer varies from state to state. Two conflicting trends impact the development of the law in this area: the reduction in the age of majority from twenty-one to eighteen in most jurisdictions; and the growing realization of the importance of a college education for children.<sup>106</sup> Generally, state laws can be divided into two camps. Only a minority

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<sup>104</sup> See, e.g., *Weisbaum v. Wiesbaum*, 477 A.2d 690 (Conn. App. Ct. 1984) (trial court erred in allowing father to invade custodial funds to alleviate his support obligations); *Erdmann v. Erdmann*, 226 N.W.2d 439 (Wis. 1975) (custodian/father could not use children's investment fund to make child support without court approval); *Wolfert v. Wolfert*, 598 P.2d 524 (Colo. Ct. App. 1979) (trial court did not err in refusing to allow husband to use the UGMA account to reduce court-ordered child support).

<sup>105</sup> The IRS is concerned when property that belongs to a minor, in custodianship or other form, generates income that is used for the minor's support. If some adult, usually a parent, has a "legal obligation" to support a minor, then, in the normal course of events, that adult must generate income to support the child and the income is taxed at the adult's rate before being used to satisfy the adult's support obligation. However, if the adult can put income-producing property in the child's name, and generate income that is taxed at the child's rate (usually lower than the adult rate), the IRS will receive less in taxes. Additionally, because the adult needs less current income, the adult may structure some of his remaining assets into tax-free or tax-deferred vehicles and thus further reduce the total taxes payable to the IRS. These possibilities do not please the IRS. So, to the extent that custodial income is used to replace some adult's "legal obligation" of support, that income is not taxed to the child, but to the adult. Rev. Rul. 56-484, C.B. 1956-2, 23. Some states may reduce or eliminate the parental obligation of support when a child has sufficient assets to care for himself. Unfortunately, the UTMA is specifically written so that it will not affect an adult's "legal obligation" to provide support under state law. UTMA, *supra* note 1, § 14(c), comment.

<sup>106</sup> "It would be extraordinary in these days to maintain that a college education is not a 'necessary.' It is necessary both from the child's and society's point of view that every child

of states either terminate all parental support obligations at the age of majority (eighteen) or explicitly refuse to recognize college as a parental support requirement.<sup>107</sup> The more common rule, however, is to include college as a potential parental obligation past the age of majority.<sup>108</sup> In determining whether the parent has an obligation and how much support the parent is expected to provide, cases decided in these jurisdictions considered the following factors: the parents' ability to pay, the child's assets, and the child's academic ability. Parents who live in one of these latter states, and who may have significant parental assets when the child reaches college age, may need to do more research before using UTMA (or some other vehicle) to transfer the college nest egg into the children's names.

Another factor that parents should consider before transferring college funds to the children is the availability of federal and state tuition assistance. Certain financial assistance is based on need, and the government and "most" schools use a formula that takes into account the parents' income, the parents' assets, and the child's assets.<sup>109</sup> Both students and parents are expected to use up a certain percentage of their assets each year toward college costs, with financial aid available only to make up the difference. The formula requires students to use as much as thirty-five percent of their assets each year, while parents must generally pay only 5.6% of their

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receive all the education he is able to receive." I HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 365 (1987, West Publishing).

<sup>107</sup> *Id.* at 364 (citing the District of Columbia and Florida as jurisdictions that do not consider a college education a "necessary" that implicates a parental support obligation). California and Texas also refuse to extend support obligations beyond the age of 18. *See* CAL FAM. CODE § 3901 (West 1994); *Jones v. Jones*, 225 Cal. Rptr. 95 (Ct. App. 2d Dist. 1986) (child could not compel father to pay for college education when child was past age of 18); TEXAS FAM. CODE ANN. § 14.05(a) (West 1986); *Ewing v. Holt*, 835 S.W.2d 274 (Tex. Ct. App. 1992) (parent's support obligation to minor beyond majority (age 18) extends only to completion of secondary education). In Pennsylvania, married parents do not have any support obligations past age 18, but divorced parents might. *See*

Pennsylvania College Expenses Act, 23 PA. CONS. STAT. ANN. § 4327 (1993). A similar distinction between the support obligations of married and divorced parents exists in Alabama. *See* *B.A. v. Alabama Dep't of Human Resources ex rel. R.A.*, Ct. Civ. App., No. AV92000784 (1994).

<sup>108</sup> CLARK, *supra* note 107, at 364-65. Clark cites cases from Colorado, Mississippi, New York, Pennsylvania, Missouri, New Jersey, Illinois, Indiana, Alabama, Georgia, Michigan, Oklahoma, South Carolina, Iowa, and Connecticut. Some of these states (*e.g.*, New Jersey) may require that the parent pay for graduate school in addition to undergraduate schooling; while other states (*e.g.*, New York (*Romansoff v. Romansoff*, 562 N.Y.S.2d 523 (N.Y. App. Div. 1990))) may require college education support only until the minor reaches the age of 21.

<sup>109</sup> *How Pros Invest for Their Kids*, MONEY MAGAZINE, Apr. 1994, at 125. Generally, parents whose combined income is \$80,000 to \$100,000 (or less) may be able to qualify for some financial aid. *Id.*

assets.<sup>110</sup> If the college money is transferred to the child (in a custodianship or otherwise), the available aid in any given year is reduced by both thirty-five percent of the college money and an additional 5.6% of the parent's own assets. If the college money remains in the name of the parent, however, the students' portion of the aid reduction formula (thirty-five percent of students' assets) probably will be minuscule, and the available financial aid will increase correspondingly.

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<sup>110</sup> Id.



**APPENDIX B**  
**UTMA/UGMA**  
Version of Act and Age of Distribution<sup>1</sup>  
Summary by Jurisdiction  
January 1995

State	UTMA	UGMA	Age of Distribution to Minor for Transfers. . .		
			<u>By Will</u>	<u>By Life Insurance<sup>2</sup></u>	<u>By Gift<sup>3</sup></u>
Alabama	X		21	Age of Majority	21
Alaska	X		18-25 <sup>4</sup>	18	18-25 <sup>5</sup>
Arizona	X		21	18	21
Arkansas	X		18-21 <sup>6</sup>	18	18-21 <sup>7</sup>
California	X		18-25 <sup>8</sup>	18-25 <sup>9</sup>	18-25 <sup>10</sup>
Colorado	X		21	21	21
Connecticut		X	21 <sup>11</sup>	21	21
Delaware	X		21	Majority	21
Dist. of Col.	X		18	18	18
Florida	X		21	18	21
Georgia	X		21	Majority	21
Hawaii	X		21	18	21
Idaho	X		21	18	21
Illinois	X		21	18	21
Indiana	X		21	21	21
Iowa	X		21	21	21
Kansas	X		21	18	21
Kentucky	X		18	18	18
Louisiana <sup>12</sup>	X		18	18	18
Maine	X		18-21 <sup>13</sup>	Majority	18-21 <sup>14</sup>
Maryland	X		21	18	21
Massachusetts	X		21	21	21
Michigan <sup>15</sup>		X	Not Avail.	Majority	18
Minnesota	X		21	18	21
Mississippi <sup>16</sup>	X		21	18	21
Missouri	X		21	Majority	21
Montana	X		21	18	21
Nebraska	X		21	Majority	21
Nevada	X		18-25 <sup>17</sup>	18-25 <sup>18</sup>	18-21 <sup>19</sup>
New Hampshire	X		21	18	21
New Jersey	X	X	18-21 <sup>20</sup>	Majority	18-21 <sup>21</sup>
New Mexico	X		21	Majority	21
New York		X	18-21 <sup>22</sup>	18-21 <sup>23</sup>	18-21 <sup>24</sup>
North Carolina	X		18-21 <sup>25</sup>	18	18-21 <sup>26</sup>
North Dakota	X		21	18	21
Ohio	X		21	Majority	21
Oklahoma	X		18	Majority	18
Oregon	X		21	18	21
Pennsylvania <sup>27</sup>	X		21	Majority	21
Rhode Island	X		18	18	18
South Carolina <sup>28</sup>		X	18	18	18
South Dakota	X		18	18	18
Tennessee <sup>29</sup>	X		21	21	21
Texas <sup>30</sup>		X	18	18	18
Utah	X		21	Majority	21
Vermont <sup>31</sup>		X	Not Avail.	Majority	Majority
Virginia	X		18 or 21 <sup>32</sup>	18	18 or 21 <sup>33</sup>
Washington	X		21	Majority	21
West Virginia	X		21	Majority	21
Wisconsin	X		21	18	21
Wyoming	X		21	Majority	21
Puerto Rico	*Not Enacted*				
Virgin Islands <sup>34</sup>		X	Not Avail.	Not Avail.	21



<sup>1</sup> This appendix lists the mandatory age at which the custodian must distribute custodial property to the minor. Information without specific citations was obtained from UTMA, supra note 1. Additionally:

(1) If a particular age (e.g., "18") is given below, that age is specifically listed in the adopting state's version of UTMA/UGMA.

(2) The word "majority" indicates that the adopting state's UTMA/UGMA references the state's laws of majority as establishing the age of distribution. In most states, the age of majority is currently 18.

(3) If the minor dies before the referenced age of distribution, all states require the custodial property to be distributed to the minor's estate.

(4) A transfer made pursuant to the UGMA generally will be terminated at the age specified under the named jurisdiction's UGMA, even if that jurisdiction later adopts the UTMA with different ages of distribution. UTMA, supra note 1, § 22c (comment). So, for example, if a transferor makes a lifetime transfer under New York's UGMA (age of distribution 18), and New York later adopts the UTMA (age of distribution 21), the proceeds still will be distributed when the minor reaches age 18.

<sup>2</sup> This column provides the age of distribution for transfers made pursuant to a designation of a custodian as beneficiary of a life insurance policy where the insured maintains ownership of the policy (e.g., SGLI). If the ownership of the life insurance policy is transferred to the custodian during the life of the transferor, then the policy is a completed gift and the age of distribution is as set forth under the "By Gift" column. If a minor is designated as an outright beneficiary under the policy and the life insurance company wishes unilaterally to establish a custodianship to receive the proceeds, the age of distribution is, generally, as set forth in the "By Life Insurance" column (in Massachusetts, however, the age of distribution would be 18).

<sup>3</sup> Inter vivos, or lifetime, gift.

<sup>4</sup> The transfer will be made when the minor reaches the age of 21, unless the will substitutes the words "as custodian for \_\_\_\_\_ until \_\_\_\_\_" for the words "as custodian for \_\_\_\_\_." The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. ALASKA STAT. §§ 1346.190; 1346.195 (1990).

<sup>5</sup> The transfer will be made when the minor reaches the age of 21, unless the transferring document substitutes the words "as custodian for \_\_\_\_\_ until \_\_\_\_\_" for the words "as custodian for \_\_\_\_\_." The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. Id. Alaska also provides that the transferor of a lifetime gift may allow the beneficiary to force distribution of the property after the beneficiary's twenty-first birthday by including the following language in the transferring document: "subject to the minor's right to compel immediate distribution of the property by giving written notice to the custodian during the six month period beginning on

the minor's 21st birthday. . . ." Id. § 1346.195(c). This option is provided for the transferor to ensure that IRC 2503(b) is satisfied if the transferor wants to take advantage of the annual \$10,000 gift tax exclusion.

6. The age of distribution will be 21 in the absence of direction to the contrary at the time the transfer is made. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. The following, or words to this effect, should be used in the document creating the custodianship: "The custodian shall transfer this property to \_\_\_\_\_ when \_\_\_\_\_ reaches the age of \_\_\_\_\_." ARK. CODE ANN. § 9-26-220 (Michie 1985).

7. See id.

8. The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words "as custodian for \_\_\_\_\_ until \_\_\_\_\_" for the words "as custodian for \_\_\_\_\_" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. CAL. PROB. CODE §§ 3920, 3920.5 (West 1984).

9. Id.

10. Id.

11. CONN. GEN. STAT. § 45a-549(d) (1992).

12. Custodianships in Louisiana terminate at age 18 or the age of "judicial emancipation," whichever is earlier. LA. REV. STAT. ANN. § 9:770 (West 1987).

13. The proceeds will be distributed to the minor when the minor reaches the age of 18, unless the transferring instrument indicates that "The custodian shall transfer \_\_\_\_\_ to \_\_\_\_\_ when \_\_\_\_\_ reaches the age of \_\_\_\_\_." The specified age of distribution must be between the eighteenth and twenty-first birthdays, inclusive. ME. REV. STAT. ANN. tit. 33, § 1671 (West 1987).

14. Id.

15. MICH. COMP. LAWS. ANN. § 554.454(4) (West 1980).

16. MISS. CODE ANN. §§ 91-20-41, 91-20-1 to 91-20-49 (1994).

17. The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words "as custodian for \_\_\_\_\_ until he attains the age of \_\_\_\_\_" for the words "as custodian for \_\_\_\_\_" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. NEV. REV. STAT. §§ 167.025, 167.034 (1985).

18. Id. § 167.033.

19. The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words "as custodian for \_\_\_\_\_ until he attains the age

of \_\_\_\_\_" for the words "as custodian for \_\_\_\_\_" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-first birthdays, inclusive. Id. §§ 167.023, 167.034.

20. In the absence of direction to the contrary at the time the transfer is made, the age of distribution will be 21. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. N.J. STAT. ANN. § 46:38A (West 1987).

21. See id.

22. N.Y. EST. POWERS AND TRUSTS LAW §§ 7-9, 7-11 (McKinney 1994). Default age of distribution is 18; transferor must add the language "until age 21" to extend age of distribution to 21.

23. See id.

24. See id. § 7-2.

25. The age of distribution will be 21 in the absence of direction to the contrary at the time the transfer is made. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. The following, or words to this effect, should be used in the document creating the custodianship: "The custodian shall transfer this property to \_\_\_\_\_ when he reaches the age of \_\_\_\_\_." N.C. GEN. STAT. § 33A-20 (1987).

26. See id.

27. 20 PA. CONS. STAT. ANN. § 5320 (1992).

28. S.C. CODE ANN. § 20-7-180(4) (Law. Co-op. 1993).

29. TENN. CODE ANN. §§ 35-7-221, 35-7-201 to 35-7-226 (Michie Supp. 1994).

30. TEX. PROP. CODE ANN. §§ 141.006(c), 141.001 to 141.014 (1984). Distribution of proceeds to a minor will take place prior to age 18 if the minor "ceases to be a minor because of marriage or the general removal of the disabilities of minority." Id. § 141.006(c)(2).

31. VT. STAT. ANN. tit. 14, §§ 3204(d), 3201 to 3209 (1989).

32. The custodial property will be distributed to the minor when the minor reaches the age of 18, unless the transferring instrument has the annotation "(21)" (or words to that effect) after the words "Virginia Uniform Transfers to Minors Act." In the latter case, the custodial property will be distributed at age 21. VA. CODE ANN. § 31-45D (Michie 1988).

33. See id.

34. V.I. CODE ANN. tit. 15, §§ 1245(d), 1241 to 1250 (1964).